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# Individual Accountability for Corporate Crime

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## INDIVIDUAL ACCOUNTABILITY FOR CORPORATE CRIME

**Gregory M. Gilchrist\***

### ABSTRACT

Corporate crime is too often addressed by fining the corporation, leaving the real people who committed the crime facing no consequence at all. This failure to hold individuals accountable in cases of corporate malfeasance generates an accountability gap that undermines deterrence and introduces expressive costs. Facing heightened criticism of this trend, then-Deputy Attorney General Sally Yates issued a policy designed to generate prosecutions of real people in cases of corporate wrongdoing. The policy reflects a strong and continuing demand for more prosecutions of individuals in the corporate context.

This Article contends that the effort to introduce accountability by increasing prosecutions against individuals, while understandable and responsive to a real problem, is bound to fail in two distinct ways. First, it will fail as a procedural matter by systematically punishing lower-level corporate employees. Second, it will fail as a normative matter by systematically punishing based on overbroad and unclear laws.

Identifying these procedural and normative failings lends new clarity to the nature of the accountability gap. The popular anger toward corporate management is often predicated on blame for recklessness and greed, rather than blame for violating positive law. As such, the anger is neither irrational nor inconsequential; however, it is directed toward a kind of culpability that is a poor fit for criminal law. The accountability gap must be addressed, but in most instances

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of corporate misconduct, civil liability represents the best mechanism for holding people accountable.

## INTRODUCTION

The last decade brought repeated and frequent bad news from the world's greatest, most powerful, and most revered corporations. Stories of abuse, misconduct, and crime within these elite and critically important institutions greet us on a near-daily basis. The legal system does a poor job governing corporate conduct. It ought to do better.

That there is too much corporate crime is not news. The question remains how to address it. Some degree of fraud was almost surely an element of the financial crisis;<sup>1</sup> in the years since, banks have paid staggering fines,<sup>2</sup> but senior bankers have been neither jailed nor even prosecuted.<sup>3</sup> This trend extends beyond the financial crisis to financial institutions more generally. A global bank systematically failed to prevent money laundering by narco-terrorist organizations,<sup>4</sup>

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1. See FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 15–16 (2011) (describing various frauds that contributed to the financial crisis). There is important disagreement about whether prosecutors had or could have generated evidence of specific frauds necessary to support prosecutions. Compare Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS, (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/> (expressing skepticism about government claims that there may have been no fraud), with Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 268 (2014) (noting that the macro-level conclusions of the Financial Inquiry Commission bear little relation to the sorts of specific evidence needed to support specific charges). The point here is smaller and entirely macro: fraudulent conduct in the financial sector almost certainly contributed to the crisis. See generally MARY KREINER RAMIREZ & STEVEN A. RAMIREZ, THE CASE FOR THE CORPORATE DEATH PENALTY: RESTORING LAW AND ORDER ON WALL STREET xi (2017).

2. See Christina Rexrode & Emily Glazer, *Big Banks Paid \$110 Billion in Mortgage-Related Fines. Where Did the Money Go?*, WALL ST. J. (Mar. 9, 2016, 4:07 PM), <https://www.wsj.com/articles/big-banks-paid-110-billion-mortgage-related-fines-where-did-the-money-go-1457557442> (reviewing fines totaling \$110 billion paid by Bank of America Corp., J.P. Morgan Chase & Co., Citigroup Inc., Wells Fargo & Co., Morgan Stanley, and Goldman Sachs Group Inc. “for their role in inflating a mortgage bubble that helped cause the financial crisis”).

3. Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 VA. L. & BUS. REV. 153, 168 (2015); RAMIREZ & RAMIREZ, *supra* note 1, at 1.

4. See Press Release, U.S. Dep't of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012) [hereinafter U.S. Dep't of Justice, HSBC Press Release],

pharmaceutical companies marketed products for purposes unapproved by the FDA,<sup>5</sup> and an auto manufacturer concealed a safety defect from regulators that allegedly contributed to 124 deaths.<sup>6</sup> In each case, the entity paid headline-generating fines, while the real people involved in the misconduct were not prosecuted.<sup>7</sup> People, not companies, commit crimes, but more often than not, companies, not people, pay the price.

This emphasis on entity-level liability is problematic. Although there are good reasons to hold organizations qua organizations accountable, doing so is insufficient as a matter of deterrence and expressive justice. And the failure to hold bad actors accountable has not gone unnoticed; indeed, some have even pointed to the failure to prosecute individuals in the wake of the financial crisis as a factor in the recent shift toward populism among the electorate.<sup>8</sup>

Entity-level criminal liability is an unusual and unwieldy construct. An organization violates an external norm when, and only when,<sup>9</sup> one or more of its agents violates that norm.<sup>10</sup> Criticisms of

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<http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html>.

5. See Press Release, U.S. Dep't of Justice, GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data (July 2, 2012) [hereinafter U.S. Dep't of Justice, GlaxoSmithKline Press Release], <https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report>.

6. See Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement with \$900 Million Forfeiture (Sept. 17, 2015), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred> [hereinafter U.S. Dep't of Justice, General Motors Press Release]; see also *Critics Rip GM Deferred Prosecution Agreement in Engine Switch Case*, CORP. CRIME REP. (Sept. 17, 2015, 10:53 AM), <https://www.corporatecrimereporter.com/news/200/critics-rip-gm-deferred-prosecution-in-switch-case/>.

7. See U.S. Dep't of Justice, GlaxoSmithKline Press Release, *supra* note 5; U.S. Dep't of Justice, HSBC Press Release, *supra* note 4; U.S. Dep't of Justice, General Motors Press Release, *supra* note 6.

8. See Gretchen Morgenson, *How Letting Bankers Off the Hook May Have Tipped the Election*, N.Y. TIMES (Nov. 11, 2016), <http://www.nytimes.com/2016/11/13/business/how-letting-bankers-off-the-hook-may-have-tipped-the-election.html> ("There are many facets to the populist, anti-establishment anger that swept Donald J. Trump into the White House in Tuesday's election. A crucial element fueling the rage, in my view, was this: Not one high-ranking executive at a major financial firm was held to account for the crisis of 2008."); see also Ryan Cooper, 2009: *The Year the Democratic Party Died*, THE WEEK (Nov. 15, 2016), <http://theweek.com/articles/661871/2009-year-democratic-party-died>.

9. In some circuits there can be minor exceptions to this statement because of the collective knowledge doctrine. See, e.g., *United States v. Bank of New Eng.*, 821 F.2d 844 (1st Cir. 1987).

10. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909) ("Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while

applying criminal law to entities are manifold, but the simplest critique is that entity-level liability punishes the wrong people: the pain of the penalty is visited primarily on innocent parties, such as shareholders.<sup>11</sup> The real people who committed the wrong generally remain unpunished.<sup>12</sup> This accountability gap undermines retributive justice and general deterrence.<sup>13</sup> Moreover, expressively, the public is left with the devastating impression that elites are immune from punishment.<sup>14</sup>

The dominant response has been a call, both formal and informal, to more aggressively prosecute the individuals involved with corporate malfeasance. The Yates Memo represents a formal iteration of this response; it alters certain policies governing prosecutorial discretion in an effort to generate more individual criminal prosecutions.<sup>15</sup> The specifics of the Yates Memo are a response to the demand that the legal system do more to hold individuals accountable.<sup>16</sup> Yates, of course, is no longer with the Department of Justice (DOJ),<sup>17</sup> and the status of any prosecutorial policy is subject to change. This issue, however, is not going away.<sup>18</sup> The urgency of

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exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.”).

11. See, e.g., John C. Coffee, Jr., “*No Soul to Damn: No Body to Kick*”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 401 (1981).

12. Haugh, *supra* note 3, at 157.

13. *Id.* at 159.

14. See, e.g., *Critics Rip GM Deferred Prosecution Agreement in Engine Switch Case*, *supra* note 6 (“GM killed over a [sic] 100 people by knowingly putting a defective ignition switch into over one million vehicles . . . [y]et no one from GM went to jail or was even charged with criminal homicide. . . . Today thanks to its lobbyists, GM officials walk off scot free while its customers are six feet under.”).

15. See Memorandum from Deputy Attorney Gen. Sally Quillian Yates to All U.S. Attorneys et al. 2 (Sept. 9, 2015), <https://www.justice.gov/dag/file/769036/download> [hereinafter Yates Memo].

16. See, e.g., Sally Q. Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, Remarks at the New York City Bar Association White Collar Crime Conference (May 6, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association> (“We cannot have a different system of justice—or the perception of a different system of justice—for corporate executives than we do for everyone else.”).

17. Rebecca Savransky, *Loretta Lynch Praises Sally Yates for “Courageous Leadership,”* THE HILL (Jan. 31, 2017, 1:41 PM), <http://thehill.com/homenews/administration/317136-loretta-lynch-praises-sally-yates-for-courageous-leadership>.

18. Indeed, enforcement trends suggest the emphasis on individual accountability has not been

the accountability gap is real; the status quo is unsatisfactory; and the demand for individual accountability is appropriate and likely to continue in any political climate. However, the understandable response that calls for more aggressive prosecutions of individuals is misguided and potentially dangerous. Emphasizing more individual prosecutions in the corporate context will inevitably trend toward prosecuting relatively low-level employees, and away from the rule of law.

This Article identifies two distinct challenges that necessarily confront any call for more individual prosecutions in the corporate context. First, incentivizing individual prosecutions fails as a procedural matter by systematically punishing lower-level corporate employees. Second, the effort is normatively flawed because it systematically punishes based on overbroad and unclear laws. To develop these arguments, this Article relies on both jurisprudential literature on the nature and function of criminal law as well as concrete examples of corporate misconduct and the criminal process.

The Article proceeds in three parts. Part I introduces the need for a change by illustrating the deterrent and expressive failures of the status quo that emphasizes entity-level accountability too often without attending to individual bad actors. Part II illustrates the inevitable failures of remedying the shortcomings of the status quo by enhancing individual prosecutions, and isolates two distinct types of failure: first, as a matter of procedure and corporate organization, such efforts will disproportionately impact lower-level employees; second, as a matter of substantive law, such efforts will create greater tension with the rule of law and undermine respect for the law. Part III suggests that civil liability represents a second-best option for remedying the shortcomings of the present approach, succeeding

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merely cosmetic. See Helen Chandler-Wilde, *Finance Regulators Target Executives in Accountability Shift*, SECS. L. DAILY (BNA) (Aug. 1, 2017) (“Executives faced four times as many financial misconduct probes by enforcement agencies in the U.K., U.S. and Hong Kong as firms did last year following the introduction of programs to hold individuals accountable, according to a report by New York-based corporate finance advisers Duff & Phelps.”).

where an emphasis on criminal law would fail, and mitigating the flaws of the status quo.

We need greater accountability for misconduct within organizations. Failure to address this problem will further undermine public trust in the law. But the answer does not lie in criminal law. Civil penalties can establish individual accountability where criminal law has failed. Laws establishing civil liability already exist but are too often ignored. Civil penalties for individuals are not perfect, but they represent a second-best option that can mitigate the deterrent and expressive harms associated with the status quo.

### *I. Entity-Level Accountability Is Necessary, but Not Sufficient*

Traditionally, the criminal law did not apply to entities. There were serious questions about whether it would even make sense to subject an organization to criminal liability.<sup>19</sup> Today, however, it is well settled (at least outside academia) that it is appropriate to hold corporations criminally liable.<sup>20</sup> The law has been clear for more than a century: a corporation can be held criminally accountable for the acts its agents commit in the scope of their agency and on behalf of the corporation.<sup>21</sup>

The Supreme Court accepted entity-level criminal liability with little thought or discussion. The *New York Central & Hudson River Railroad v. United States* decision is commonly identified as the first application of broad criminal liability to corporations.<sup>22</sup> The case is

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19. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 464 (1765). Blackstone claimed it was impossible. *See id.* (“A corporation cannot commit treason, or felony, or other crime, in its corporate capacity.”); *see also* Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 808 (1996) (“The classic view of the corporation’s potential criminal liability, as expressed by Blackstone, was that a corporation could not be held liable for a crime, although individual members could be punished for corporate acts.”).

20. *See, e.g.*, Robert E. Bloch, *Compliance Programs and Criminal Antitrust Litigation: A Prosecutor’s Perspective*, 57 ANTITRUST L.J. 223, 227 (1988) (“It has long been established that under a federal statute like the Sherman Act, a corporation may be held criminally liable for the acts and declarations of its officers, employees, and agents performed within the scope of their actual or apparent authority.”).

21. *See N.Y. Cent. & Hudson River R.R. Co.*, 212 U.S. at 495.

22. *Id.* This was not the first time a corporation was held criminally liable, but it is the case generally

remarkable for its brevity and lack of analysis. Pam Bucy described the opinion as suffering from “three major flaws”: “failure to appreciate the inherently different nature of civil and criminal law”; “failure to consider the civil alternatives to corporate criminal liability”; and “failure to examine the alternative standards for imposing criminal liability upon corporations.”<sup>23</sup> Bucy offers cogent criticism; the opinion does suffer from these deficiencies, and the first is the most problematic. Indeed, the very rationale for imposing criminal liability on corporations is nothing more than the observation that entities are responsible for their agents’ actions in the civil sphere.<sup>24</sup> Whether and why this principle ought to extend into the criminal realm remains entirely unaddressed in this brief and significant opinion.

Although criticism of the Court’s rationale for corporate criminal liability is widespread, scholars diverge on the ultimate question of whether corporations should be subject to criminal liability. Some have described entity-level criminal liability as inefficient and possibly purposeless,<sup>25</sup> and sometimes irrational and nonsensical.<sup>26</sup> Others, including myself, have argued that corporate criminal liability does serve a function, and although precise formulations and rationales differ, most arguing in favor of corporate criminal liability do so because it has an expressive component that matters.<sup>27</sup>

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identified with establishing a doctrine of corporate criminal liability. *See, e.g.,* *United States v. Van Schaick*, 134 F. 592, 593 (1904); *see also* Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 4 n.14 (2012).

23. *See* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1114–15 (1991).

24. *See N.Y. Cent. & Hudson River R.R. Co.*, 212 U.S. at 494 (explaining that “[a]pplying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation,” can render the principle corporation criminally liable).

25. *See, e.g.,* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1499 (1996).

26. *See* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1373 (2009).

27. *See, e.g.,* David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1235 (2016); Gilchrist, *supra* note 23, at 1; Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 473 (2006).



We ought to punish corporations qua corporations because the failure to do so fosters the dangerous message that corporations may price criminal conduct.<sup>28</sup> Criminal law is special in that it entails a component of social condemnation.<sup>29</sup> Corporations suffer none of the more dramatic bodily or psychological traumas routinely visited on real persons convicted of crimes; by removing even the societal expression of moral condemnation inherent in a criminal conviction, we leave corporations in a fundamentally different position relative to criminal law. For persons, the expression inherent in substantive criminal law is “thou shalt not . . . .”<sup>30</sup> If corporations are subject only to civil penalties, the message is that everything is permitted, albeit priced.<sup>31</sup> This is contrary to the nature and purpose of criminal codes, and it remains the best justification for imposing criminal liability on corporations.

Entity-level liability is therefore necessary; it is not, however, sufficient. By itself, it fails to deter future wrongdoing, and too much reliance on entity-level liability introduces new expressive costs.

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28. Gilchrist, *supra* note 22, at 7 (“Immunizing corporations from prosecution would present its own symbolism: Namely, corporations may violate criminal laws if they are willing to pay for it. Corporate crime would thus be little more than a menu of harms and prices.”). Of course, not all substantive offenses are alike, and insider trading and securities fraud more generally raise some distinctive issues that make entity-level liability less attractive. Generally, firms are not prosecuted for illegal trading by their employees. See Howard J. Kaplan, *Corporate Criminal Liability for Insider Trading*, *Securities Litigation*, A.B.A. (Dec. 4, 2014), <http://apps.americanbar.org/litigation/committees/securities/articles/fall2014-1114-corporate-criminal-liability-insider-trading.html> (“Although insider traders often work for business entities, their employers are rarely held criminally liable for their acts.”). For a comprehensive analysis of the reasons entity liability fails normatively and as a deterrent in most fraud on the market civil cases, see Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 703 (1992). Fraud on the market is distinctive in that the set of victims will include the firm and other shareholders, and there is good reason to believe that the fraud stems from agency costs as managers act to protect themselves against poor performance. *Id.* at 702–03. Although Arlen and Carney are directly addressing firm-level civil liability, much of their analysis could be echoed for criminal liability in the securities context.

29. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 405 (1958) (“[Crime] is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”).

30. John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 225 (1991).

31. *Id.* at 195–96.

### A. *Insufficient Deterrence*

By any measure, deterrence is a central function of criminal law. Criminal law catalogues forbidden conduct, and by criminalizing conduct, society reduces the incidence of the conduct.<sup>32</sup> There are important questions about the mechanisms by which, and the degree to which, deterrence works.<sup>33</sup> Yet few would deny that criminalizing conduct deters that conduct to some degree.<sup>34</sup>

Entity-level enforcement actions, however, are of particularly limited deterrent value for two reasons. First, in many cases, it is impossible to set entity-level penalties high enough to deter rational, wealth-maximizing conduct.<sup>35</sup> Deterrence theory tends to be modeled on a simplistic economic approach to decision-making. In its most basic formulation, deterrence theory turns on imposing a cost that, even when discounted by the chance that conduct will go undetected or unpunished, outweighs the benefit to the person or entity deciding whether to engage in the conduct.<sup>36</sup> For example, a corporation that secures a bid through bribery will be deterred only if the value it perceives in the winning bid is less than the penalty for bribery, discounted by the chance the bribery would remain unpunished. Since most corporate criminal conduct remains undetected, the

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32. See Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2386 (1997) (describing deterrence, albeit skeptically, as the “grand unified theory” of criminal law).

33. See *id.* (explaining “the ways in which the deterrence question is more difficult than many of us have assumed and illustrates how criminalization can create unintended, and sometimes perverse, incentives”); see also Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953 (2003) (explaining effective deterrence requires, at a minimum, notice, a perceived consequence greater than the perceived benefit of violation, and the ability to comport one’s behavior to rational standards, and cautioning that social science literature provides strong reasons to be skeptical about each of these).

34. See Robinson & Darley, *supra* note 33, at 951 (“There seems little doubt that having a criminal justice system that punishes violators, as every organized society does, has the general effect of influencing the conduct of potential offenders.”); see also MODEL PENAL CODE § 1.02, Explanatory Note (identifying “the dominant theme [for the framework governing the definition of offenses] is the prevention of offenses”).

35. See Coffee, *supra* note 11, at 390 (“[T]he maximum meaningful fine that can be levied against any corporate offender is necessarily bounded by its wealth.”).

36. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1209 (1985) (“[T]he murderer will not be comparing the gain from the crime with the loss if he is caught and sentenced; he will be comparing it with the disutility of the sentence discounted by the probability that it will actually be imposed.”).

discount rate is necessarily high.<sup>37</sup> The problem with applying this model to corporations is that corporations are frequently judgment-proof to the penalties theoretically required to adequately deter wrongdoing. Corporations can only be compelled to pay what they have.<sup>38</sup> Accordingly, a company's wealth limits the punishment.<sup>39</sup> For a company that would be ruined by a million-dollar fine, there is no difference between a potential fine of \$1 million and a potential fine of \$100 million. Both pose existential threats. If the deterrence calculus necessitates a fine beyond what a company can pay, deterrence falters.

The second deterrence failure of entity-only liability might be described as an agency cost,<sup>40</sup> or a fundamental component of the separation of ownership from control.<sup>41</sup> The only way for a corporation to act, or to commit a crime, is through its agents.<sup>42</sup> Generally, punishing the corporation involves imposing a fine and other remedial conditions.<sup>43</sup> But whatever the form, any punishment of the corporation is reducible to money. And the money comes primarily from the owners of the corporation.<sup>44</sup> The line between ownership and control of the corporation is the fundamental challenge for every component of corporate governance, and in this case the division is stark. Control violated the law, and ownership pays for that violation.

A corporation functions through the actions of its board, officers, employees, and other agents.<sup>45</sup> These real people making decisions

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37. *Id.*

38. Coffee, *supra* note 11, at 390.

39. *Id.*

40. See Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1635 (2008) ("[A]gency costs include any losses the principal suffers because his agent pursues her own goals."); see also Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

41. Jensen & Meckling, *supra* note 40, at 309.

42. *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) ("[T]he only way in which a corporation can act is through the individuals who act on its behalf.").

43. See generally Coffee, *supra* note 11, at 386–87.

44. See *id.* at 401.

45. See Elizabeth E. Joh & Thomas W. Joo, *The Corporation As Snitch: The New DOJ Guidelines*

about corporate conduct have their own agendas, rationales, incentives, and risk tolerances.<sup>46</sup> Paying a bribe to secure a contract the firm values at \$1 million is not worth it *to the corporation* if there is a ten percent chance that paying the bribe will result in a \$20 million dollar fine. However, the corporation does not decide whether to pay the bribe; a corporate agent does. That agent—maybe a national manager who is concerned she will lose out on a bonus or promotion if she fails to meet a looming target—faces entirely different considerations.

Sometimes the complexity of modern corporate conduct overwhelms the imagination. Simplicity clarifies. The piracy case *Harmony v. United States* against the brig *Malek Adhel* nicely illustrates the fundamental agency problem with using entity-level liability as a deterrent.<sup>47</sup> During the summer of 1840, this cargo ship, captained by Joseph Nunez, set sail from New York to Guayamas, California (now Mexico).<sup>48</sup> The journey quickly got off course.<sup>49</sup> Although the court records are limited, they make clear that a planned mercantile voyage transformed over the summer into an oddly inept sort of piracy.<sup>50</sup> The court case does not clarify why or how the captain engaged in this conduct, but it does conclusively establish two key facts. First, the ship was engaged in acts of piracy.<sup>51</sup> Second, the owners of the ship “never contemplated or authorized” the piratical acts.<sup>52</sup>

Notwithstanding their uncontested innocence, the owners were punished. Their ship was seized by the United States for its violation of the Act of March 3, 1819, ch.75, “to protect the commerce of the

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on *Prosecuting White Collar Crime*, 101 VA. L. REV. ONLINE 51, 55 (2015) (explaining corporations “can act only through its human agents”).

46. See Coffee, *supra* note 11, at 394–95; see also Ian B. Lee, *Corporate Criminal Responsibility as Team Member Responsibility*, 31 OXFORD J. LEGAL STUD. 755, 758 (2011).

47. See *Harmony v. United States*, 43 U.S. 210, 222 (1844).

48. *Id.* at 230.

49. *Id.*

50. See *id.* at 212–20 (deposition of John Myers, acting first mate).

51. *Id.* at 232.

52. *Id.* at 230.

United States, and to punish the crime of piracy.”<sup>53</sup> Reviewing the seizure, the Court concluded that the owners’ innocence was immaterial.<sup>54</sup> The statute provided for action against any vessel involved in acts of piracy; the *Malek Adhel* was involved in acts of piracy, and therefore seizure was appropriate.<sup>55</sup> Tellingly, the Court wrote, “[t]he vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner.”<sup>56</sup>

The analogy is not perfect, because this is not a case involving a corporation and the case involves forfeiture, piracy, and even a reference to the lawless status *hostis humani generis*.<sup>57</sup> It is plainly distinguishable from modern corporate criminal cases. The lesson, however, is clear: the law does sometimes permit action against a thing, and the harm that action causes to the innocent owners of the thing does not prevent the action.

The *Harmony* case offers three justifications for inflicting a financial penalty on the innocent owners. First, the action is against the vessel, not the owners, and their harm is incidental.<sup>58</sup> Although supported by history, this formalistic division between in rem and in personam actions is unlikely to satisfy any but the most arcane readers.<sup>59</sup> Second, the innocence of the owners is somewhat less than that of the victims of the piracy, and the owners’ property represents the “best and surest pledge for the compensation and indemnity to the injured party.”<sup>60</sup> This second justification makes sense in the context of a piracy forfeiture; it carries less weight in the context of a

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53. *Harmony*, 43 U.S. at 229.

54. *Id.* at 233.

55. *Id.* at 233–34.

56. *Id.* at 233.

57. *Id.*

58. *Id.* at 234 (“[T]he offence is primarily attached to the thing.”).

59. Indeed, Al Alschuler leverages the absurdity of blaming a thing as part of his critique of entity-level liability. See Alschuler, *supra* note 26, at 1373 (comparing imposing criminal liability on a corporation to smashing a computer in frustration: “therapeutic, but it is not recommended for children or for grownups”).

60. See *Harmony*, 43 U.S. at 234.

corporate fine that will not directly benefit the victims of the misconduct.<sup>61</sup> The third justification is only hinted at; the owners, although innocent, remain the party most capable of preventing this conduct in the future.<sup>62</sup> The owners never contemplated these piratical acts, but piracy was a risk of merchant marine ventures, of which they must have been aware. How careful was their decision to have Joseph Nunez captain their ship? How fulsome was the interview? Did they conduct background checks? Did their actions meet industry best practices for evaluating risk? Maybe, after these innocent owners forfeit their ship, future owners would exercise greater care in choosing their captains. Maybe.

The deterrence rationale is real, but of plainly limited effect. Particularly in the corporate context, ownership is separated from control such that any effort to deter future misdeeds by punishing shareholders succeeds only in the most ethereal and indirect manner. Whether it is correct or not, one can imagine that seizing a ship engaged in piracy might change the behavior of other ship-owners in such a way as to reduce future acts of piracy. And, one can imagine that when HSBC paid fines exceeding one billion dollars,<sup>63</sup> management at that bank and other large financial institutions paid renewed attention to Anti-Money Laundering (AML) and Office of Foreign Assets Control (OFAC) compliance.<sup>64</sup> Punishing ownership

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61. Although some money collected in corporate criminal fines is used to help victims, most of the money goes to the state or federal governments involved in the investigation. *See, e.g.*, Press Release, U.S. Dep't of Justice, Justice Department Collects More Than \$8 Billion in Civil and Criminal Cases in Fiscal Year 2013 (Jan. 9, 2014), <https://www.justice.gov/opa/pr/justice-department-collects-more-8-billion-civil-and-criminal-cases-fiscal-year-2013>.

62. *Harmony*, 43 U.S. at 233. Forfeiture of the vessel is "the only adequate means of suppressing the offense or wrong." *Id.*

63. *See* U.S. Dep't of Justice, HSBC Press Release, *supra* note 4.

64. The compliance industry certainly continues to use the case to sell compliance products. *See, e.g.*, Andrew Simpson, *HSBC Still Chasing AML Compliance, Even After \$680 Million Spend*, CASEWARE ANALYTICS (June 1, 2016), <https://www.casewareanalytics.com/blog/hsbc-still-chasing-aml-compliance-even-after-680-million-spend>. Whether such sanctions establish well-calibrated compliance is debatable; for more on rent-seeking risks inherent in internalized compliance responsibilities, *see* Donald C. Langevoort, *Internal Controls After Sarbanes-Oxley: Revisiting Corporate Law's "Duty of Care As Responsibility for Systems,"* 31 J. CORP. L. 949, 967 (2006) (discussing, in the context of Sarbanes-Oxley, the incentives for both external attorneys and consultants, as well as internal departments like "[i]nformation technology, internal audit, compliance, and legal

can generate deterrence, but the connection between ownership and control is sufficiently attenuated such that effective deterrence requires unwieldy penalties, and more reasonable penalties are unlikely to generate sufficient deterrence. In the *Harmony* case, the penalty—loss of the entire vessel—was plainly out of proportion with the scope of culpability: insufficient due diligence. A lesser penalty would have been fairer, but it would have failed to inspire other vessel owners to take note of the relatively small risk their captain would turn pirate.

Entity-level penalties punish owners most directly. Owners are poorly situated, compared with management and corporate agents, to prevent future wrongdoing. Therefore, entity-level penalties are, at best, an *inefficient* means of deterring wrongdoing. At worst, they are an *insufficient* means of deterring wrongdoing.

### B. Harmful Expression

Deterrence is not the only, nor is it a sufficient, reason to impose entity-level criminal liability.<sup>65</sup> Punishing the entity serves an important expressive role.<sup>66</sup> Indeed, the expressive cost of systematically failing to hold entities criminally liable is a necessary component justifying corporate criminal liability.<sup>67</sup> Absent the possibility of holding corporations criminally liable, the legal system sends a message that criminal conduct is merely priced, not forbidden, when engaged in on behalf of a corporation. This message is at odds with social norms; it is corrosive, and it threatens the perceived legitimacy of the legal system.<sup>68</sup>

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services”).

65. There is little or no deterrence secured through imposing criminal liability on a corporation that could not be achieved equally through civil liability. *See Khanna, supra* note 26, at 1499 (“All of these sanctions [most commonly associated with entity-level criminal liability] are or can easily be made available in corporate civil liability regimes.”).

66. Gilchrist, *supra* note 22, at 6.

67. *See id.* (“[T]he most significant expressive value associated with corporate criminal liability is the expressive cost of immunizing corporations.”).

68. *Id.* at 49–50.

However, exclusively penalizing organizations for criminal conduct introduces its own expressive cost. By failing to hold the real people who engaged in wrongdoing accountable, the legal system sends the dangerous message that shareholders will indemnify crimes committed on Wall Street, while prison awaits those who commit crimes on Main Street. I previously explored this problem in the context of financial institutions,<sup>69</sup> but it has a broader application. The problem can be described as one of affirmance: the systematic failure to punish individuals who commit crimes in the corporate setting not only fails to condemn, it can signal the conduct's affirmation.<sup>70</sup>

This concern—about the dangers of treating elite crimes differently than street crimes—has been echoed in a wide array of fora.<sup>71</sup> A handful of commentators have already begun to identify public anger over this perceived double standard as a potential factor in the recent presidential election.<sup>72</sup> A well-functioning legal system must be perceived as legitimate.<sup>73</sup> The consistent failure to hold high-level executives accountable for high-profile corporate misdeeds

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69. See Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, 85 U. COLO. L. REV. 1, 1 (2014).

70. Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 871 (2013) (“[A]ffirmance stands for the proposition that *not* pursuing or *not* punishing elite crime adequately can undermine the rule of law, diminish confidence in government, and promote further costly criminality.”) (footnotes omitted).

71. See, e.g., Rakoff, *supra* note 1 (suggesting the DOJ’s failure to prosecute high-level executives in the wake of the financial crisis risks appearing as “disregard for equality under the law”). When caught engaged in criminal conduct, large financial institutions “all were handed the equivalent of traffic tickets—pay a fine on your way out the door.” Robert Mazur, *How to Halt the Terrorist Money Train*, N.Y. TIMES (Jan. 2, 2013), <http://www.nytimes.com/2013/01/03/opinion/how-bankers-help-drug-traffickers-and-terrorists.html>. Entity-level settlements have “fostered concerns that ‘too big to fail’ Wall Street banks enjoy a favored status, in statute and in enforcement policy. This perception undermines the public’s confidence in our institutions and in the principal that the law is applied equally in all cases.” Letter from U.S. Senators Sherrod Brown and Charles Grassley to Eric Holder, U.S. Attorney General (Jan. 29, 2013), <http://www.grassley.senate.gov/about /upload/01-29-13-Letter-to-Holder-on-Wall-Street-Prosecutions.pdf>.

72. See Morgenson, *supra* note 8; Cooper, *supra* note 8.

73. See Gregory M. Gilchrist, *Condemnation Without Basis: An Expressive Failure of Corporate Prosecutions*, 64 HASTINGS L.J. 1121, 1134 (2013) (describing the relationship between the expressive value of legal action, the perceived legitimacy of a legal system, and the functionality of that system).



amounts to legal expressions at odds with public values and corrodes the perceived legitimacy of the legal system.

*II. Individual Prosecutions for Corporate Misconduct Cannot Address the Accountability Gap*

If entity-level liability is insufficient, it seems reasonable to call for prosecution against the actual people who are causing the entity to engage in misconduct.<sup>74</sup> Banks are aiding money laundering? Go after some bankers. Big Pharma is marketing for off-label purposes? Prosecute some executives. Car companies are cheating on safety measures? Lock up the C-suite. Action against senior officials would create powerful incentives to avoid future misconduct, and it would send an admirably clear message that criminal acts will be afforded no more tolerance in the corridors of power than they are in West Baltimore.

The DOJ promoted this message in 2015. Then-Deputy Attorney General Sally Quinn Yates wrote to all federal prosecutors:

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.<sup>75</sup>

The memorandum directed federal prosecutors to concentrate on bringing criminal actions against individual wrongdoers in cases of corporate criminality and to amend the U.S. Attorneys' Manual accordingly, specifically the Principles of Federal Prosecution of

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74. See, e.g., Rakoff, *supra* note 1.

75. See Yates Memo, *supra* note 15, at 1.

Business Organizations.<sup>76</sup> Furthermore, it provided that corporations should receive *no* leniency for cooperating with law enforcement unless the company discloses “all relevant facts about individual misconduct.”<sup>77</sup> In this way, the memorandum not only instructs prosecutors to concentrate on individual prosecutions, it also incentivizes corporations to provide prosecutors the evidence they will need to do so.

This effort, however understandable and even commendable, will meet only the most limited success. A few executives may pay a public price, but deterrence and expressivism will falter at the obvious arbitrariness of punishment.<sup>78</sup> And the vast weight of the criminal justice system will fall mostly on lower-level personnel. Moreover, because of the breadth and vagueness of much of the substantive criminal law applicable in the corporate contexts, too many individual prosecutions will be sullied by the appearance of post hoc vengeance inconsistent with the basic principles of due process. This Part considers each of these failures in turn.

#### *A. The Procedural Limits of Individual Criminal Prosecutions*

Individual prosecutions fall disproportionately on lower-level corporate agents.<sup>79</sup> This is not a circumstantial error in prosecutorial discretion; rather, it is the predictable result of the corporate form and the process of corporate investigations. Consequently, any policy initiative intended to enhance the incidence of criminal prosecutions against individuals in the corporate context will generate the greatest impact among relatively low-level employees.

This systemic bias generates costs. Disproportionately prosecuting lower-level employees undermines deterrence and threatens the

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76. *Id.* at 2–3.

77. *Id.* at 3.

78. Richman, *supra* note 1, at 276 (“Unless we are careful—or are ready for a more sustained commitment of resources—the message of a relative handful of prosecutions will be ‘a few heads will roll when the market takes a deep dive and the public seeks retribution.’ And the target deterrence audience will weigh the slim chance that lightning will strike them against the enormous financial gains from continued play.”).

79. RAMIREZ & RAMIREZ, *supra* note 1, at 7.

perceived legitimacy of the legal system. Where the cost of crime is paid by a subset of those responsible, deterrence suffers because other prospective bad actors observe that most people involved in corporate wrongdoing get away with it.<sup>80</sup> Where senior personnel consistently avoid being penalized for the decisions they make, there is no general deterrence for those who are similarly situated.<sup>81</sup> Expressively, the law appears arbitrary, if not institutionally biased, in favor of elites.<sup>82</sup> The perception that the law treats people differently based on social status is at odds with the rule of law, and it undermines trust in the legal system.<sup>83</sup> And the perception of differential treatment based on irrelevant factors causes these harms, whether the perception is accurate or not. As I will address further below, this perception in the corporate context is not entirely accurate—because frequently the relevant factor leading to disparate treatment is differential evidence or even differential culpability—but the perception itself is real, harmful, and not easily overcome.

A legal system that appears to be engaged in scapegoating—or, to use Dan Richman’s memorable phrase, “corporate headhunting”<sup>84</sup>—scares few and appears illegitimate. The specter of prosecution appears like the risk of shark attack: dramatic, frightful, and unlikely to happen to you. The stories of engineers or middle managers whose lives are overturned as they face the full arsenal of investigative and prosecutorial weapons wielded by the DOJ resonate tragedy and injustice.<sup>85</sup> The public, rightfully angry at a harm caused by a

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80. *Id.* at 8.

81. *Id.*

82. See David Thacher, *Channeling Police Discretion: The Hidden Potential of Focused Deterrence*, 2016 U. CHI. LEGAL F. 533, 552 (2016) (“Overinclusive laws also contribute to arbitrary punishment—to differences in treatment that result from accidents of fate, caprice, and other morally irrelevant factors.”).

83. See Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 8 (1997) (“[T]he Rule of Law should guarantee against at least some types of official arbitrariness.”).

84. See Richman, *supra* note 1, at 265.

85. The pressure on the few, often-relatively-low-level, employees charged in instances of large scale corporate misconduct is immense. One can, with a little imagination, get a glimpse of the pathos of these cases in the recent New York Times obituary of Donald Vidrine, one of two rig supervisors charged with manslaughter following the Deepwater Horizon disaster. See Clifford Krause, *Donald J.*

corporation, finds itself unable to direct its blame at these targets.<sup>86</sup> The legal system thus accomplishes little while seeming mean-spirited, arbitrary, or wrongheaded.

Need it be so? Might not prosecutors use their broad discretion to bring cases that avoid these problems? Probably not. The problem of low-level targeting is largely unavoidable in our legal system, and the phenomenon is not new. When the DOJ indicts individuals in the corporate context, it rarely indicts senior corporate officials.<sup>87</sup>

Todd Haugh recently provided an excellent example of the continued practice of prosecuting relatively low-level employees for high-profile failures.<sup>88</sup> Kareem Serageldin was prosecuted for conspiracy to falsify books and records of a financial institution.<sup>89</sup> Serageldin was broadly portrayed (with plenty of assistance from the United States Attorney for the Southern District of New York and the Federal Bureau of Investigation) as a senior Wall Street official, and the crime was widely portrayed as importantly connected to the United States financial crisis.<sup>90</sup> The agency rationale for this portrayal is clear. Following the financial crisis, there were no prosecutions of the people responsible.<sup>91</sup> The criticisms—some misplaced—were strong.<sup>92</sup> So, with Serageldin, the government had a responsive narrative: we are prosecuting senior Wall Street officials for wrongdoing leading to the financial crisis.

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*Vidrine, Supervisor on Ill-Fated Deepwater Horizon Rig, Dies at 69*, N.Y. TIMES (Jun. 6, 2017), <https://www.nytimes.com/2017/06/06/business/energy-environment/donald-vidrine-died-deepwater-horizon-supervisor.html>.

86. See, e.g., Aruna Viswanatha, *U.S. Bid to Prosecute BP Staff in Gulf Oil Spill Falls Flat*, WALL ST. J. (Feb. 28, 2016), <http://www.wsj.com/articles/u-s-bid-to-prosecute-bp-staff-in-gulf-oil-spill-falls-flat-1456532116> (describing the “ignominious end to the final case in the government’s effort to find individuals criminally responsible for the blowout on the Deepwater Horizon,” in which a drill site supervisor had difficulty describing what he did wrong to support his misdemeanor guilty plea).

87. Gilchrist, *supra* note 69, at 4.

88. See Haugh, *supra* note 3, at 153.

89. See *id.* at 155.

90. See *id.* at 155–56.

91. Gilchrist, *supra* note 69, at 4.

92. *Id.* at 45 (describing criticism of the DOJ for failure to bring more prosecutions and explaining why many of these criticisms were, while understandable, probably misplaced).

The problem, as Haugh makes clear, is that Serageldin was not a senior Wall Street official, and aside from temporal overlap, his criminal conduct had little to do with the financial crisis.<sup>93</sup>

This phenomenon of rarely prosecuting individuals, and when doing so going after relatively low-level figures, is not isolated. A recently published study of the issue found that, between 2001 and 2014, most corporate resolutions were not accompanied by an individual prosecution, and the minority that were brought prosecutions not against “high-up officers of the companies, but rather middle managers of one kind or another.”<sup>94</sup>

The remainder of this Section explores the reasons for this imbalance in criminal accountability. The DOJ’s emphasis on individual accountability for corporate wrongdoing creates a real risk of problematically selective accountability. This bias toward lower-level offenders is the result, first, of choice; second, of the process of internal investigations; and third, of organizational structure and decision-making. The conclusion one should draw from this is not that individuals should never be prosecuted in the corporate context; rather, the correct conclusion is that the effort to better police large organizations through encouraging more individual prosecutions is misguided, and potentially harmful.

### 1. *Choice and the Problem of Non-Cooperation*

Shortly after the Yates Memo appeared, one significant problem was immediately identified.<sup>95</sup> The new policies, though drafted with strong language, actually offer corporations a choice. “To be eligible for *any* cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.”<sup>96</sup> Corporations can thus elect whether to

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93. See Haugh, *supra* note 3, at 156–57.

94. See Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1791 (2015).

95. See Joh & Joo, *supra* note 45, at 58.

96. Yates Memo, *supra* note 15, at 3 (emphasis in original).

cooperate and seek credit or to forgo credit and cooperation.<sup>97</sup> To be sure, this choice is not new; corporations could always elect to not cooperate with a criminal investigation.<sup>98</sup> And the new policies represent a shift toward coercing cooperation by rendering the choice, at least in theory,<sup>99</sup> all or nothing. Nonetheless, by permitting the option of noncooperation, the policy suffers from the same agency problems that render entity-level deterrence so weak.<sup>100</sup>

If the people running the investigation face criminal exposure themselves, the decision to forgo *any* cooperation credit for the corporation—credit that will take the form of monetary leniency spread across all ownership—will be easy. Some corporations will elect, through the decisions of self-interested agents, to forgo all cooperation credit.<sup>101</sup> Senior management exercises significant influence over most internal investigations, and senior management is subject to a conflict of interest on the question of self-reporting where they face exposure. This possibility suggests that the pool of self-reported problems will be generated with a systemic bias against including cases of misconduct involving senior management.

Of course, senior management does not always exercise control over internal investigations. Indeed, best practices dictate that when an investigation reveals a conflict of interest for the legal department, or whatever management role is leading the investigation, responsibility for the investigation must shift to a non-conflicted party, such as an audit committee.<sup>102</sup> However, this shift happens

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97. See Joh & Joo, *supra* note 45, at 58.

98. Indeed, it is possible the Yates Memo changed nothing and amounts to little more than political talking points. See Joseph W. Yockey, *Beyond Yates: From Engagement to Accountability in Corporate Crime*, 12 N.Y.U. J.L. & BUS. 409, 411 (2016).

99. See *infra*, Part II.A.2.

100. See Joh & Joo, *supra* note 45, at 58 (arguing that “[a]n offer of leniency toward the corporate entity is unlikely to entice CEOs and other board members to incriminate themselves”).

101. *Id.*

102. See, e.g., JONES DAY, CORPORATE INTERNAL INVESTIGATIONS: BEST PRACTICES, PITFALLS TO AVOID 19–20 (2013), <http://www.jonesday.com/files/upload/CII%20Best%20Practices%20Pitfalls%20to%20Avoid2.pdf> (arguing that “where the corporation effectively is investigating its own management, the audit committee or a special committee of the board of directors would likely be convened for the specific purpose of supervising the internal investigation”).

when someone in a management or board position requires it to happen.<sup>103</sup> Outside counsel can play an important role in effectively shifting authority over the investigation,<sup>104</sup> but in many, many cases, management determines the scope and direction of the investigation.<sup>105</sup> Similarly, one might point out that law enforcement is not solely reliant on internal investigations. Independent, external investigations exist, as do whistleblowers.<sup>106</sup> So, there will be exceptions. However, given the significant role senior management plays in a significant number of internal investigations, one would expect a bias to manifest in disparate attention to corporate malfeasance for which senior management is not responsible.

## 2. *Information Asymmetry and the Problem of Selective Cooperation*

The problem of non-cooperation is compounded by information asymmetry between law enforcement and those running the investigation.<sup>107</sup> Information in most corporate investigations runs from those controlling the internal investigation to law enforcement.<sup>108</sup> This is not always the case, of course. Some investigations involve whistleblowers who circumvent internal control of the investigation.<sup>109</sup> Others involve traditional, external law enforcement tools, such as wiretaps and search warrants.<sup>110</sup> Moreover, companies disclose information to the

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103. *Id.* at 21.

104. *Id.* at 20.

105. *See id.*

106. *See* Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73, 89 (2013).

107. *Id.* By law enforcement, the article refers broadly to the various persons and agencies responsible for investigating and prosecuting corporate malfeasance, including investigative agencies such as the FBI, as well as prosecuting attorneys such as those at United State Attorneys Offices, the DOJ, or state Attorney General offices. *See id.*

108. *See* Garrett, *supra* note 94, at 1845.

109. *See, e.g., Office of the Whistleblower*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/whistleblower/> (last visited Aug. 25, 2017) (soliciting reports of securities violations and promoting significant financial rewards for whistleblowers).

110. These exceptions are functionally significant because the possibility of external detection of internal problems critically influences the internal deliberations about whether to self-report. *See* Jason

government. DOJ attorneys are perfectly capable of asking, and routinely do ask, substantive and procedural follow-up questions: who else saw this slide presentation; did you interview X; et cetera.<sup>111</sup> At the end of the day, however, the federal government simply lacks the resources to police the vast majority of conduct within corporations,<sup>112</sup> and enforcement relies heavily on internal investigations and self-reporting. In cases investigated internally, those controlling the investigation exercise considerable control over its course and extent.

This control introduces the possibility that corporations will, in some cases, be able to withhold certain information about some individuals while still receiving cooperation credit, because law enforcement will be unable to discern the lack of candor.<sup>113</sup> To the

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Varnado & David Woodcock, *To Self-Report or Not to Self-Report*, TEX. LAW. (Dec. 1, 2016), <http://www.texaslawyer.com/id=1202772652517/To-SelfReport-or-Not-to-SelfReport?slreturn=20161114144555> (identifying the possibility of independent investigation by law enforcement and whistleblower reporting as two of the three primary reasons a company may elect to self-report).

111. See Leslie R. Caldwell, Assistant Attorney General for the Criminal Division, U.S. Dep't of Justice, Remarks at the 22nd Annual Ethics and Compliance Conference (Oct. 1, 2014), <https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-22nd-annual-ethics> ("Although the department welcomes and encourages corporate cooperation, we do not rely upon it. We conduct our own robust investigations—often alongside that of the company—to build our own criminal cases and to pressure-test corporate claims of cooperation.").

112. See Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 529 (2004) ("The concern of government oppression is much diminished in the corporate realm with respect to large firms. With large firms, the dynamic is reversed; government may well lack the resources to effectively investigate and litigate against its private opponent."). Brown is mostly addressing the significant resources that large corporations must match to beat traditional law enforcement. The challenge, however, extends well beyond this fact. The set of "corporate conduct" is massive. It entails literally millions of decisions and actions every day, across the globe. Millions may be too small by an order of magnitude. Consider that there are about 3,000 corporations listed on the New York Stock Exchange. NYSE Companies, NASDAQ, <http://www.nasdaq.com/screening/companies-by-industry.aspx?exchange=NYSE> (last visited Oct. 2, 2017). Most of these are large; some are giant. If each listed company engages in 1,000 transactions per day (from entering a supply agreement with a foreign nation to purchasing new printers to hiring a news sales representative), there would be three million individual transactions per day. That is only counting companies listed on the New York Stock Exchange. And 1,000 transactions per day is probably too few. The point is, the scale of conduct that occurs within and on behalf of corporations is so vast that any effort at external policing will, necessarily, only scratch the surface.

113. The Yates Memo itself acknowledges the opacity of internal corporate information. See Yates Memo, *supra* note 15, at 2 (describing the difficulties of obtaining detailed information about corporate conduct from an external perspective).



extent those in charge of the investigation face possible personal exposure, there is a strong incentive to limit the scope of the investigation. While there are some checks against self-interest corrupting the course of an internal investigation,<sup>114</sup> they are not strong.

It is therefore possible for organizations to selectively reveal information to law enforcement while maintaining the posture of a more complete disclosure. Internal investigations and self-reporting are, in this way, little different than civil discovery; the responding party is expected to make tactically beneficial decisions to the extent doing so is defensible. These tactics can serve both the interests of the organization and the interests of management.

In the case of a particular wrongdoing within and on behalf of a corporation, the corporation possesses the most complete set of knowledge about the misconduct. An internal investigation proceeds with the primary goal of protecting the entity and the secondary goal of gathering the relevant information.<sup>115</sup> One might object that the entity can only be protected once all the information is known. This objection rests comfortably only in the realm of the ideal. Investigations are messy.<sup>116</sup> They involve information gathering, but also, inevitably, the dissemination of information.<sup>117</sup> Sometimes the firm is legally barred from requiring confidentiality from its employees.<sup>118</sup> And in any event, employees can, and often do,

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114. See Fallon, *supra* note 83, at 8.

115. See JONES DAY, *supra* note 102, at 45.

116. Jason M. Knott & Sara L.A. Lawson, *The Yates Memo Calls for Greater Focus on Individual Criminal Accountability for Corporate Crime: Who Wins and Who Loses?*, A.B.A. LITIG. MATERIALS, [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016\\_sac/written\\_materials/4\\_knott%20who\\_wins\\_and\\_who\\_loses.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016_sac/written_materials/4_knott%20who_wins_and_who_loses.authcheckdam.pdf). To list but a few examples, investigations can have a “negative impact on morale . . . [.] complicate the dynamic between outside counsel hired to conduct the internal investigation and the high-level executives who may have played a role in engaging this counsel,” and can cause “executives with even marginal exposure . . . to resign.” *Id.*

117. *Id.*; Banner Estrella Med. Ctr., 362 N.L.R.B. No. 137, slip op. at 2–3 (2015).

118. See Banner Estrella Med. Ctr., 362 N.L.R.B. No. 137, slip op. at 5 (ordering that company to “[c]ease and desist from . . . [m]aintaining or enforcing a policy of requesting employees not to discuss ongoing investigations of employee misconduct”).

disregard confidentiality rules.<sup>119</sup> As a result, one of the risks of conducting an investigation is that the investigation itself will put the entity in a worse position (for example, by increasing the risk of a whistleblower on an issue the entity would not have elected to self-report). Fundamentally, lawyers conducting internal investigations, whether at the direction of senior management, a legal department, or an audit committee, are acting to benefit the company.<sup>120</sup> This primary goal can be served in a variety of ways,<sup>121</sup> including more fulsome, or less fulsome, information gathering and internal remediation.

The difficulty of discerning the corporate interest is a constant; however, the challenge is exacerbated where those being asked to identify the corporate interest have a potential conflict. Independent audit committees represent the most vigorous procedural check against the risk of self-dealing in investigations. Delegating to an audit committee the task of conducting an internal investigation, including the role of selecting outside counsel, helps mitigate the risk that the corporation's best interest will be convoluted by the interests of management.<sup>122</sup> If nothing else, the Yates Memo is likely to cause prosecutors to be less trusting of corporate investigations directed by management than those directed by boards or audit committees.<sup>123</sup>

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119. Merge Gupta-Sunderji, *Three Reasons to Ignore your Company's Policy Manual*, THE GLOBE AND MAIL (Oct. 6, 2015, 5:00 PM), <https://www.theglobeandmail.com/report-on-business/careers/leadership-lab/three-reasons-to-ignore-your-companys-policy-manual/article26684784/>.

120. See, e.g., Green & Podgor, *supra* note 106, at 74.

121. *Id.* at 91 ("The internal investigation industry basically operates with little oversight as the investigations are unmonitored and unregulated.").

122. SEC v. Worldcom, Inc., No. 02 CIV. 4963(JSR), 2003 WL 22004827, at \*17 (S.D.N.Y. Aug. 26, 2003) ("[B]oards of directors, outside auditors and outside counsel are the gatekeepers of behavior standards who are able to prevent damage before it occurs if they are alert, and above all if they are willing to act when necessary.").

123. Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Stanford, CA. Speech: A Few Things Directors Should Know About the SEC (June 24, 2014), <https://www.sec.gov/News/Speech/Detail/Speech/1370542148863> ("Those of you who are directors play a critically important role in overseeing what your company is doing, and by preventing, detecting, and stopping violations of the federal securities laws at your companies, and responding to any problems that do occur. In other words, you are the essential gatekeepers upon whom your investors and, frankly, the SEC rely."). This speech preceded the Yates Memo, but the view that enforcement will look to directors as gatekeepers, coupled with the requirements of fulsome disclosure in the Yates Memo,

Yet, although delegating investigative authority to an audit committee mitigates the risk of covertly limited investigations to protect individuals, it does not eliminate the risk. The fact remains that information flows upward in an organization, and throughout any process, including an investigation, senior management can exercise some influence on the process.

Sally Yates, when announcing the new policies now known as the Yates Memo, said:

Effective immediately, we have revised our policy guidance to require that if a company wants any credit for cooperation, any credit at all, it must identify all individuals involved in the wrongdoing, regardless of their position, status or seniority in the company and provide all relevant facts about their misconduct. It's all or nothing. No more picking and choosing what gets disclosed.<sup>124</sup>

Ultimately, this remains an aspirational demand, and the result is a systemic bias in the investigative process that favors senior corporate personnel whose interests will frequently align, or will be perceived as aligning, with those of the people actually running the investigation.

### *3. Organizational Hierarchy and the Distribution of Evidence and Culpability*

Lower-level personnel lack the institutional protections of their senior colleagues, and they will also be disproportionately targeted simply as a matter of evidence. This is an admittedly odd sentence, and hopefully it gives the reader pause. “Simply as a matter of evidence,” sounds like a tortured circumlocution to avoid saying that

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suggest that the government sees the best compliance as board-driven compliance.

124. See, e.g., Sally Quillian Yates, Deputy Attorney General, U.S. Dep’t. of Just., Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

senior personnel did not commit any crimes. That criticism, addressed below, is fair and, in many instances, accurate. To begin, however, it is helpful to think about evidence.

In almost all cases where law enforcement identifies corporate malfeasance, there exists at least one agent who caused the wrong. Corporations act through, and only through, their agents.<sup>125</sup> If a corporation committed a crime, then, *ipso facto*, a person committed a crime on behalf of the corporation.<sup>126</sup> As then-Assistant Attorney General Lanny Breuer put it: “Make no mistake: [w]hile the company is guilty, individuals committed these crimes.”<sup>127</sup> Indeed, given the nature of most corporate malfeasance and organizational hierarchy, there will often be many responsible agents.<sup>128</sup> The corporate agents who most directly committed the wrongdoing on behalf of the organization tend to be lower-level personnel. Simply because of the way organizational hierarchies distribute authority and information,<sup>129</sup> in any given instance those who act on behalf of the organization tend not to be senior management. Crime often stems from small decisions: the decision to retain a particular agent to assist in bid procurement; the decision to accept a deposit without checking every AML know-your-customer box; the decision to book sales in violation of accepted accounting principles; et cetera. These decisions are made by personnel further down the organizational

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125. See, e.g., Green & Podgor, *supra* note 106, at 81–82.

126. One possible exception to this rule would be in jurisdictions allowing corporate *mens rea* to be established through the collective knowledge doctrine. See, e.g., *United States v. Bank of New Eng.*, 821 F.2d 844, 856 (1st Cir. 1987). In such cases, it is possible for a corporation to be guilty of a crime even though no person exists who committed that crime, because the actions and mental states comprising the crime are attributable to different corporate agents, none of whom would have held the requisite *mens rea*, but who collectively can be used to hold the entity responsible. See *id.*

127. See Viswanatha, *supra* note 86.

128. See Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scierter*, 2006 COLUM. BUS. L. REV. 81, 86 (2006) (“[M]any corporations are large decentralized groups of individuals, often with collectivized decision making structures and a multitude of actors participating in a single corporate act.”).

129. See Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1197 (2003). In the corporate context, “the principal has delegated a large amount of discretion to the agent—the principal hasn’t the time, expertise, or interest to make all the decisions personally.” *Id.*

hierarchy, and knowledge of these decisions is disproportionately housed further down the organizational chart as well.

David Uhlmann describes the prosecutions following the BP Deepwater Horizon disaster as “a classic example”<sup>130</sup> of a case where “the weight of criminal prosecution falls on individuals who, while culpable, had no control over the corporate policies that led to criminal activity.”<sup>131</sup> Uhlmann notes “widespread agreement” that BP maintained a corporate culture that promoted risk-taking over environmental or workplace safety, and that this culture was the root cause of the disaster.<sup>132</sup> Yet the only people charged with crimes following this preventable accident, which caused the death of eleven men and untold environmental degradation, were rig supervisors who “had no role in the development of BP’s policies or its corporate culture.”<sup>133</sup>

The BP prosecutions were based on a key safety test that was not conducted properly; accordingly, those who conducted or directly supervised that test had the most exposure.<sup>134</sup> On-site supervisors were responsible for the test.<sup>135</sup> The first results were unclear; a retest led to similarly-unclear results.<sup>136</sup> Subsequently, the supervisors consulted and eventually authorized drilling to proceed.<sup>137</sup> There were 126 people aboard the vessel.<sup>138</sup> Of these, only seven were BP employees, whereas the rest worked for the rig-owner, Transocean, or other subcontractors.<sup>139</sup> Two BP employees, Robert Kaluza and

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130. Uhlmann, *supra* note 27, at 1277.

131. *Id.*

132. *See id.* (citing NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING*, 122–26 (2011), <https://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>).

133. *See id.*

134. *See* Tom Fowler & Russell Gold, *Engineers Deny Charges in BP Spill*, WALL ST. J. (Nov. 18, 2012, 7:20 PM) <http://www.wsj.com/articles/SB10001424127887323622904578127173280594296>.

135. *Id.*

136. *Id.*

137. *See id.*

138. *See* CHRISTINA INGERSOLL, RICHARD M. LOCKE & CATE REAVIS, MIT SLOAN MGMT., *BP AND THE DEEPWATER HORIZON DISASTER OF 2010* 1 (Apr. 3, 2012), <https://mitsloan.mit.edu/LearningEdge/CaseDocs/10%20110%20BP%20Deepwater%20Horizon%20Locke.Review.pdf>.

139. *See id.*

Donald Vidrine, were eventually charged (although not convicted) with involuntary manslaughter, and committing a lawful act in an unlawful manner, leading to the death of another.<sup>140</sup> They were also charged with negligence and inattention to duties while employed on a vessel, leading to the death of another.<sup>141</sup> The alleged “unlawful manner” and negligence related exclusively to their failures in responding to the uncertain safety test results, and the eventual authorization to drill notwithstanding those results.<sup>142</sup> Such failures will tend to be isolated around the event itself, even if a deeper cause of the failure is clearly identified in a problematic corporate culture.<sup>143</sup>

Further from the event, evidence necessarily becomes more attenuated. Perhaps the supervisor’s training was inadequate or even misleading, but linking this failure to the eventual decision to drill notwithstanding uncertain test results—a decision that may occur many years and miles away from the training—is difficult. And the poor training case seems simple from the prosecutorial perspective when compared to the imagined prosecution of a senior executive for having set a tone that contributed to a culture of risk-taking, which undermined safety training and eventually led to a bad decision by someone he never met on a rig he never visited. The public was quick to scoff at senior DOJ officials who claimed that lack of evidence, not lack of interest, led to the dearth of individual prosecutions in the banking context following the financial crisis.<sup>144</sup> But lack of evidence, and the evidentiary complexity of these cases more

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140. See Superseding Indictment for Involuntary Manslaughter, Seaman’s Manslaughter and Clean Water Act at 9, *United States v. Kaluza*, No. 12-265, 2013 WL 6490341 (E.D. La. Nov. 14, 2012), <https://www.justice.gov/iso/opa/resources/2520121115143638743323.pdf> [hereinafter *Superseding Indictment, Kaluza*].

141. See *id.* at 14.

142. See *id.* at 5–6.

143. In the BP case, these more serious charges were eventually abandoned by the prosecution or dismissed by the court. See Viswanathan, *supra* note 86. Mr. Vidrine eventually pled guilty to a misdemeanor offense, and Mr. Kaluza was acquitted at trial. See *BP Engineer Is Not Guilty in Case from 2010 Gulf Oil Spill*, N.Y. TIMES, Feb. 25, 2016, [http://www.nytimes.com/2016/02/26/business/energy-environment/bp-engineer-is-not-guilty-in-case-from-2010-gulf-oil-spill.html?\\_r=0](http://www.nytimes.com/2016/02/26/business/energy-environment/bp-engineer-is-not-guilty-in-case-from-2010-gulf-oil-spill.html?_r=0).

144. Yockey, *supra* note 98, at 413.

generally, is almost certainly the single most significant factor limiting individual prosecutions.<sup>145</sup>

In the BP case, the real people charged, Kaluza and Vidrine, were the senior employees on site.<sup>146</sup> They reported to John Guide, who in turn reported to David Sims, BP's Manager of Drilling Operations for the Gulf of Mexico.<sup>147</sup> Multiple lines of report up the chain sat Tony Hayward, who, in his three years as CEO, maintained an "aggressive growth strategy" and "spoke publicly about his desire to transform BP's culture to one that was less risk averse."<sup>148</sup>

Kaluza and Vidrine made the decision to drill notwithstanding the inconclusive safety test results, and this formed the basis for their indictment.<sup>149</sup> But they would have made this decision knowing that delay on an oil rig is incredibly costly.<sup>150</sup> Indeed, subsequent investigation revealed that this particular drilling operation, because of weather and other delays, was already more than \$20 million over budget.<sup>151</sup> And Kaluza functioned in a culture that openly favored risk over safety.<sup>152</sup> Kaluza and Vidrine likely assumed that their job security and potential advancement would turn on their functioning consistently with that culture. In the end, their decisions reflected these facts.<sup>153</sup>

We may blame a culture of risk-taking, and disregard for safety and environmental regulations, for a disaster like the one on the

145. Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221, 274–75 (2004). The lack of complex corporate fraud cases stems not from "prosecutorial footdragging" but rather from the complexity of the facts. *Id.* at 275.

146. Superseding Indictment, Kaluza, *supra* note 140, at 1.

147. See NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *supra* note 132, at 97; see also David Hammer, *BP Manager, Boss Both Ignored Warnings Before Deepwater Horizon Blew, Panel Learns at Oil Spill Hearings*, TIMES-PICAYUNE (Aug. 26, 2010, 5:45 PM), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/bp\\_manager\\_boss\\_both\\_ignored\\_w.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/bp_manager_boss_both_ignored_w.html).

148. See INGERSOLL, LOCKE & REAVIS, *supra* note 138, at 3.

149. See Fowler & Gold, *supra* note 134.

150. See INGERSOLL, LOCKE & REAVIS, *supra* note 138, at 8 ("Transocean charged BP approximately \$500,000 per day to lease the rig, plus roughly the same amount in contractor fees.").

151. See Hammer, *supra* note 147.

152. *Id.*

153. See INGERSOLL, LOCKE & REAVIS, *supra* note 138, at 19 ("[C]ourt testimony indicates that the three key decisions [leading to the Deepwater Horizon disaster], and perhaps others as well, came down on the side of cost-reduction and expediency, over caution.").

Deepwater Horizon. But when we look at culpable decisions made with *mens rea*, evidence will aggregate on the rig and dissipate as we move through the corporate structure to engineers onshore in Mexico and eventually to corporate executives in Europe. The locus of criminality rests, correctly, with those with “blatant culpability.”<sup>154</sup>

Simply put, the hierarchy and structure of corporations mean that most corporate acts occur at levels many steps removed from central management.<sup>155</sup> Such acts might be pursuant to the directives, policies, or tones set by central management, but lower-level personnel perform most corporate acts.<sup>156</sup> For example, central management might set specific growth targets for the entity; product divisions then establish their own goals to achieve the net target; regional product divisions then set internal targets to contribute toward the larger goal; and a particular salesperson decides whether and how much puffery to engage in as he nears an unmet deadline. In a fraud case, the clearest evidence will rest with the sales person who made the untrue statements. It may be possible to craft a case against managers who set goals, if it can be shown they knew their goals could only be achieved through misrepresentations, but to describe the case is to realize it is orders of magnitude more difficult than the fraud case against the person who made the untrue statements.<sup>157</sup> Even in the case where management *did* have the requisite *mens rea*, finding evidence to support that fact is challenging.<sup>158</sup> In many cases,

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154. See Richman, *supra* note 1, at 270 (“The de facto requirement of blatant culpability—demanding that a defendant be shown to have had a subjective awareness of real wrongdoing—is anchored in our use of general jurisdiction prosecutors and judges and of lay jurors. It isn’t a bug in our system but a feature.”).

155. Peter J. Henning, *A New Crime for Corporate Misconduct?*, 84 MISS. L.J. 43, 51 (2014) (“Many corporate officials are far removed from the day-to-day company decisions that can turn out to be fraudulent, so it is difficult to find evidence to establish their knowledge in the circumstantial evidence.”).

156. Abril & Olazábal, *supra* note 128, at 122 (“[C]orporations themselves encourage illegality for their own benefit, from sub rosa encouragement to fostering a culture of ‘making the numbers’ at all costs, including illegality.”) (footnotes omitted).

157. See Coffee, *supra* note 30, at 229 (“[C]overt signals from senior corporate management can send the implicit message throughout the organization that compliance with law is desirable, but increased profitability is mandatory.”).

158. Peter Henning has described this evidentiary problem:

Unlike defendants who brandish weapons or traffic narcotics and stolen



however, simply as a consequence of the nature of decision-making and action within large organizations, senior management will, as a matter of fact, lack the requisite *mens rea*.<sup>159</sup>

Some contend that the answer is to more effectively target high-level personnel. One recent op-ed suggests increasing certainty of punishment as a means of enhancing deterrence.<sup>160</sup> The classic formulation is to impose smaller penalties with greater frequency.<sup>161</sup> In the corporate context, however, this represents a false alternative. The failure to prosecute high-level corporate personnel does not stem from a problem with, or concern about, large penalties. Nor does it generally stem from a lack of enforcement resources. The failure, such as it is, results from narrow substantive laws with appropriate *mens rea* standards.<sup>162</sup> Mere greed is not criminal.

One option prosecutors have when they lack evidence of the substantive crime is to pursue the cover-up crimes. “[T]he reality is that many white collar criminals have been prosecuted using crimes that are ‘cover-up’ or ‘short-cut’ offenses, such as obstruction of justice and making false statements.”<sup>163</sup> While there is value in prosecuting these sorts of offenses, the nature of corporate governance suggests these prosecutions will also be aggregated around particular personnel, and not necessarily the personnel most

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property, whose denials of culpability are inherently suspect, a corporate manager can plausibly claim to have been ignorant of the details of a transaction, to not understand the full ramifications of what happened, or to have believed that there was nothing improper about a decision because other advisers—both inside and outside the company—never questioned its propriety. Ignorance of the law may not be an excuse for a crime, but it can be an effective defense when the violation requires proof of knowledge.

Henning, *supra* note 155, at 51.

159. *Id.*

160. See Robert H. Tillman & Henry N. Pontell, *Corporate Fraud Demands Criminal Time*, N.Y. TIMES (June 29, 2016), <https://nyti.ms/2989ZkN> (suggesting “imposing relatively short prison sentences on a much larger number of white-collar defendants”).

161. See Barry J. Pollack, ‘A Few Not So Good Men’: *People Go to Prison, Nothing Changes*, 14 ANDREWS SEC. LITIG. & REG. REP. 1, 2 (2009) (“Studies uniformly show that consistent application of lesser penalties provides stronger deterrence than selective application of extreme penalties.”).

162. Henning, *supra* note 155, at 51.

163. See Ellen S. Podgor & Lucian E. Dervan, “White Collar Crime”: *Still Hazy After All These Years*, 50 GA. L. REV. 709, 715 (2016) (footnotes omitted).

responsible for the underlying wrongdoing.<sup>164</sup> Compliance personnel and attorneys face the greatest exposure for so-called cover-up crimes, simply because reported malfeasance is generally directed toward them and the failure to respond can generate exposure.<sup>165</sup> As with the systematic prosecution of actually-guilty-but-lower-level offenders, the systematic prosecution of gatekeepers fails to address the heart of the problem and risks devolving into something closer to vengeance than justice.

Simply put, if prosecutors are pushed to bring individual cases where evidence is lacking, they will be compelled to prosecute lower-level offenders and more subsidiary crimes. To target the misconduct that most frequently exists among corporate management, the criminal law would need to address recklessness or negligence. That would be a mistake.

#### *B. The Normative Limits on Individual Corporate Prosecutions*

Criminal law is inherently moral and expressive.<sup>166</sup> In the corporate context, criminal law is “our most powerful tool for expressing what conduct is outside the bounds of acceptable corporate behavior.”<sup>167</sup> However, the expressive component of criminal law is lost where the substantive law is unclear. Worse, post hoc imposition of criminal liability for conduct not plainly forbidden *ex ante* undermines the rule of law and generates a moral dissonance that threatens the perceived legitimacy of the legal system. The criminal law that applies in the corporate context is frequently

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164. Henning, *supra* note 155, at 53.

165. *Id.*

166. See Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1420 (2009) (“[D]esignating conduct as criminal is important apart from any sanction imposed and that the application of the criminal law to an actor in society is a means to express a moral judgment about that actor’s conduct.”); see also Joel Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397, 400 (1965) (distinguishing punishment by reference to the necessary accompanying “expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation”).

167. Uhlmann, *supra* note 27, at 1263.

lacking in clarity, and efforts to harness these vague criminal laws to regulate corporate conduct more broadly are problematic.<sup>168</sup>

### 1. *Overbroad and Unclear Criminal Laws*

The substantive law sets forth a code, and violations of that code are condemned. Some parts of the code are so fundamental as to be entirely uncontroversial among sane adults who made it through kindergarten: don't murder;<sup>169</sup> don't hit;<sup>170</sup> don't take other people's stuff.<sup>171</sup> Other parts are less evident: you may not sell a BB gun to a minor in Massachusetts;<sup>172</sup> you may not trade securities based on material non-public information;<sup>173</sup> and you may not try to secure a business advantage by providing a thing of value to a foreign government official.<sup>174</sup> Absent a clear code to the contrary, these latter offenses would be difficult to condemn.<sup>175</sup>

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168. To be clear, criminal prosecutions can and should be brought against individual actors who engage in forbidden conduct within a corporation. Nothing in this article should be understood as arguing to limit the scope of criminal prosecutions where the prosecutor can produce evidence of guilt sufficient to convince a jury beyond a reasonable doubt of a sufficiently-defined crime. Corporate malfeasants can and should be punished. The current environment, however, sees a call for more aggressive prosecutions and less burdensome substantive laws; this article challenges these systemic efforts to enhance criminal prosecutions as a tool of corporate governance.

169. See, e.g., OHIO REV. CODE ANN. § 2903.02 (West 2017) ("No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.").

170. See OHIO REV. CODE ANN. § 2903.13 ("No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn.").

171. See OHIO REV. CODE ANN. § 2913.02 ("No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services . . . [w]ithout the consent of the owner . . .").

172. See MASS. GEN. LAWS ch. 269, § 12A (2017) ("Whoever sells to a minor under the age of eighteen or whoever, not being the parent, guardian or adult teacher or instructor, furnishes to a minor under the age of eighteen an air rifle or so-called BB gun, shall be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment for not more than six months.").

173. Securities Exchange Act of 1934 § 20A, 15 U.S.C. §§ 78(j), 78(t), 78(ff) (2012); 17 C.F.R. §§ 240.10b-5, 240.10b-5-2 (2017).

174. 15 U.S.C. § 78dd-1 *et seq.* (2012).

175. One might object that all crimes require a clear code in order to condemn. This objection is sound: *ex ante* clarity is a necessary component of condemnation. This difference between *malum in se* crimes and *malum prohibitum* crimes is that the former enjoy a degree of clarity even without a legal code, and this clarity is absent with the latter. In other words, the distinguishing characteristic of *malum in se* crimes is the widely-shared normative clarity that requires no reference to substantive law regarding these offenses.

While it is true that this distinction between *malum in se* and *malum prohibitum* crimes can be blurred, it remains useful at least to identify poles on a spectrum.<sup>176</sup> It is wise, however, not to vest too much in the distinction, as it remains only as firm as the set of common moral norms. Just twenty years ago, Robinson and Darley wrote:

[C]urrent law has extended criminalization beyond even the domain of traditional *malum prohibitum* offenses, to criminalize conduct that is ‘harmful’ only in the sense that it causes inconvenience for bureaucrats. Thus, most federal regulations are now routinely converted to federal crimes to give the regulators greater leverage in enforcement.<sup>177</sup>

Undoubtedly, many would still agree with this statement, but the referent of the statement has probably shifted. Some number of offenses that would have seemed plainly *malum prohibitum* two decades ago now enjoy significant normative support, at least in some communities. For example, although adding a criminal penalty to a mine safety regulation<sup>178</sup> at one point would have represented a clear example of a tool for giving “regulators greater leverage in enforcement,” the public interest in Massey CEO Don Blankenship’s conviction for conspiracy to violate this rule suggests that the popular norm surrounding mine safety has shifted.<sup>179</sup>

Still, closer examination of the mining regulations suggests the alignment between public condemnation and legal violation is not so precise. The public anger against Blankenship stems from the

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176. It is precisely this failure of notice that helps bound legal culpability. Those who, by virtue of youth or mental disability or defect, lack the capacity to understand the requirements of law are excused from violations of the law.

177. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 479 (1997).

178. See 30 U.S.C. § 820(d) (2012).

179. See, e.g., Ken Ward, Jr., *Ex-Massey CEO Blankenship now in California Federal Prison*, CHARLESTON GAZETTE-MAIL (May 12, 2016), <http://www.wvgazettemail.com/news/20160512/ex-massey-ceo-blankenship-now-in-california-federal-prison> (detailing Massey reporting to serve his prison sentence).

perception that he disregarded the safety of his employees to maximize profits;<sup>180</sup> this anger erupted when twenty-nine miners lost their lives in the Upper Big Mine Branch disaster.<sup>181</sup> The indictment taps into this particular and compelling source of blame in its first paragraph, stating that Blankenship “fostered and participated in an understanding that perpetuated [the] practice of routine safety violations, in order to produce more coal, avoid the costs of following safety laws, and make more money.”<sup>182</sup> But the actual regulation is, as would be expected, far more specific, revealing that the systemic violations involved failures such as maintaining insufficient pressure on water sprays meant to suppress dust and cool equipment.<sup>183</sup> The widely-shared norm condemns decision-making that values profits over safety, at least where those decisions resulted in the tragic death of twenty-nine men. And it may also condemn the systematic and intentional disregard for specific regulations put in place to prevent that type of disaster. However, it is far less likely there is a widely-shared norm that would condemn reducing water spray below a regulatory threshold. Even among those savvy enough in mine safety to maintain a moral judgment about this relatively esoteric practice, the judgment would probably be tied to a concept of reasonableness for the particular operation, as opposed to the arbitrary number set by federal regulation.

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180. A highly critical *Rolling Stone* article gives a sense of the tenor of much of the public outcry. Jeff Goodell, *The Dark Lord of Coal Country*, ROLLING STONE (Nov. 29, 2010), <http://www.rollingstone.com/politics/news/the-dark-lord-of-coal-country-20101129> (describing how Blankenship “transformed himself into the embodiment of everything that’s wrong with the business and politics of energy in America today—a man who pursues naked self-interest and calls it patriotism, who buys judges like cheap hookers, treats workers like dogs, blasts mountains to get at a few inches of coal and uses his money and influence to ensure that America remains enslaved to the 19th-century idea that burning coal equals progress. And for this, he earns \$18 million a year—making him the highest-paid CEO in the coal industry—and flies off to vacations on the French Riviera.”).

181. *Id.* (citing the “fact that 29 men died violent deaths in large part because Don Blankenship ran what amounted to an outlaw coal mine, racking up more than 500 safety violations and nearly \$1 million in fines last year alone”).

182. Indictment at 1, *United States v. Blankenship*, No. 5:14-cr-00244, 2014 WL 6386743 (S.D.W. Va. Nov. 13, 2014).

183. *Id.* at 8.

The criminal law has drifted, and continues to drift, beyond the limited field of obviously immoral conduct into risk regulation.<sup>184</sup> Bernard Harcourt argued years ago that the harm principle, originally a necessary-but-insufficient condition for criminalization, had become toothless because harm is ubiquitous.<sup>185</sup> He concluded that “harm is no longer in fact a necessary condition because non-trivial harm arguments are being made about practically every moral offense.”<sup>186</sup> And, as both Harcourt and Joel Feinberg concede, the harm principle gives little or no guidance for comparing or weighing harms.<sup>187</sup> If morality is no longer a necessary condition for criminalization, and the harm principle has metastasized into almost all human activity, then the answer to Feinberg’s original question—“what sorts of conduct may the state rightly make criminal?”<sup>188</sup>—may consist of little more than procedural requirements, such as representation, deliberation, and notice.<sup>189</sup>

The emphasis on risk over morality in criminal law is particularly strong in the corporate context. Where substantive factors no longer bound criminalization, the procedural factors gain significance. As the law seeks to condemn conduct about which there is less shared and less obvious moral ground, it is increasingly reliant on establishing its own clarity. The law must plainly state that which is

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184. See *City of Chicago v. Morales*, 527 U.S. 41, 98 (1999) (Scalia, J., dissenting) (“[A]ll sorts of perfectly harmless activity by millions of perfectly innocent people can be forbidden—riding a motorcycle without a safety helmet, for example, starting a campfire in a national forest, or selling a safe and effective drug not yet approved by the Food and Drug Administration. All of these acts are entirely innocent and harmless in themselves, but because of the risk of harm that they entail, the freedom to engage in them has been abridged.”).

185. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 114 (1999).

186. *Id.*

187. *Id.* Feinberg concedes that, ultimately, the harm principle is “largely an empty formula”; however, he also introduces a catalogue of comparative principles “meant to help the hypothetical legislator by providing his nearly vacuous guiding principle with a little more content, a little clearer direction.” JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 188, 203 (1984).

188. Feinberg, *supra* note 187, at 3.

189. Indeed, this seems to be the view expressed by Justice Scalia in *Morales*. See *Morales*, 527 U.S. at 73–98 (Scalia, J., dissenting).

forbidden and punish only that which is forbidden.<sup>190</sup> Failure to do so leaves people subject to condemning punishment<sup>191</sup> for behavior not subject to any widely-shared norm, unlimited by any cogent harm principle, and without notice. In such instances, the condemnation inherent in punishment falters and we are left with something more like a tantrum than a principled punishment. If we are to punish without moral grounding, then clarity of notice becomes critical.

Unfortunately, the criminal law that is generally applied in the corporate context is not at all clear. Substantive corporate law—that is, the set of rules governing conduct in the corporate setting—is broad and in a near-constant state of flux. Questions about the scope of prohibited conduct under the Racketeer Influenced and Corrupt Organizations Act are seemingly limitless.<sup>192</sup> Early efforts to govern corporate conduct—through administrative civil actions—involved enforcement decisions with retroactive definitional impact.<sup>193</sup> In the administrative context, what appeared to be overbroad substantive laws were upheld as lawful delegations of authority.<sup>194</sup> These early efforts to govern corporations may be the foundation for the vague standards and imprecise language that characterize much of the substantive corporate criminal law today.<sup>195</sup> The result is plain: the

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190. See Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 L. & CONTEMP. PROBS. 23, 48 (1997) (“The moral nature of the criminal law should not be undercut by permitting the criminal punishment of those who cannot fairly be blamed for their actions.”).

191. To punish is to blame. See JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 98 (1970) (identifying the “symbolic significance” and the “expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation” as distinctive aspects of punishment).

192. See Dan M. Kahan, *Is Chevron Relevant to Criminal Law?*, 110 HARV. L. REV. 469, 472 (1996).

193. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

194. *Id.* at 197. The controlling statute in *Chenery* was the Public Utility Holding Company Act of 1935, which empowered the SEC to limit the issuance or sale of securities.

195. *Id.* at 208. The connection between the legal underpinnings of the expanding administrative state and expansive criminal laws is limited. Indeed, a fundamental tenet of *Chenery*, and subsequent decisions grounding the administrative state, is the subject matter policy expertise of designative executive agencies. The DOJ and U.S. Attorneys—the executive actors most responsible for interpretation and enforcement of criminal laws—have admirable expertise, ability, and independence; but, with the exception of a few anomalous divisions within DOJ, few would claim these executive actors exercise strong subject matter expertise over the matters governed by corporate criminal law.

scope of potentially-forbidden conduct in the corporate context is broad and poorly defined.<sup>196</sup>

Insider trading is replete with uncertainty. Scholars have mounted a sustained attack on the lack of clarity in insider trading law.<sup>197</sup> Honest services fraud has been subject to continued attack as impermissibly vague.<sup>198</sup> Corruption law is little better.<sup>199</sup>

The breadth and lack of clarity in corporate criminal law are not new. Ellen Podgor wrote in 1994 that “white collar crime is changing so rapidly that it is difficult to provide a firm or constant setting for its understanding.”<sup>200</sup> Nearly a decade and a half earlier, Jed Rakoff wrote of the possibility that “the scope of the mail fraud statute is too great, either in requiring only a very minimal amount of reprehensible conduct to trigger its application or in extending its application to an immensely broad and as-yet ill-defined spectrum of intentions and activities . . . .”<sup>201</sup> Many of the criminal laws that

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196. This point is related to, but distinct from, complaints about overcriminalization. Overcriminalization refers to the state of criminalizing far more conduct than should or could be enforced. See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748 (2005). There are many serious problems stemming from overcriminalization, including the possibility of over-incarceration. But see Peter J. Henning, *Making Sure “The Buck Stops Here”: Barring Executives for Corporate Violations*, 2012 U. CHI. LEGAL F. 91, 107–08 (“The critique that there is overcriminalization appears to be used more as a placeholder to describe how the criminal law has expanded so that there are too many defendants being prosecuted and incarcerated, sometimes for significant periods of time.”). One problem of criminalizing too much conduct is that it “give[s] enforcement authorities far too much unchecked discretion to select those few cases that will actually be prosecuted.” Beale, *supra*, at 766. The breadth and poor definition of laws applied to corporate conduct trigger this concern in particular.

197. See, e.g., John P. Anderson, *Solving the Paradox of Insider Trading Compliance*, 88 TEMP. L. REV. 273, 274 (2016); Joan MacLeod Heminway, *Just Do It! Specific Rulemaking on Materiality Guidance in Insider Trading*, 72 LA. L. REV. 999, 1000–01 (2012); Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 AM. U. L. REV. 1131, 1133–34 (2003); Donald C. Langevoort, *Informational Cronyism*, 69 STAN. L. REV. ONLINE (Oct. 2016), <https://www.stanfordlawreview.org/online/informational-cronyism/> (describing the massive uncertainty inherent in the line between civil and criminal enforcement being defined by the “inexcusably elusive” standard of “willfulness”).

198. See *Skilling v. United States*, 561 U.S. 358, 408–09 (2010) (limiting honest services fraud under 18 U.S.C. § 1346 to bribe and kickback schemes).

199. The Supreme Court recently brought needed, if still too little, clarity to corruption law. See *McDonnell v. United States*, 136 S. Ct. 2355, 2367–68 (2016) (limiting the meaning of “official act” under 18 U.S.C. § 201).

200. See Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 AM. CRIM. L. REV. 391, 391 (1994).

201. See Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 821 (1980)



apply to corporate actors are expansive and poorly drafted, and they fail to give notice as to what conduct is forbidden. Some uncertainty is unavoidable, if only as the consequence of our reliance on a language that is organic and less-than-mathematically precise.<sup>202</sup> Much of the criminal law in the corporate context, however, remains problematically uncertain.

## 2. *One Rule of Law Problem: Unbound Discretion*

The rule of law is very near to a first principle in legal theory, and yet, or perhaps because of that, it suffers from a lack of analytic precision.<sup>203</sup> This is probably more of an academic problem than a practical one. Practicing attorneys and judges refer to the rule of law with considerably less skepticism and confusion than scholars.<sup>204</sup> Putting aside the fundamental definitional challenges, a basic and relatively uncontroversial aspect of the rule of law is a limit on the power to deprive others of life, liberty, or property, except where there exists a predetermined set of conditions that permit that deprivation.<sup>205</sup> The problem with this description, however, is that by failing to define the condition pursuant to which one may be deprived of life, liberty, or property, it is rendered empty. For example, were it established that one may be deprived of life, liberty, or property if

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(advocating a jurisdictional approach to the use of mails element, while recognizing the possibility that this would cause the mail fraud statute to become unmanageably broad).

202. See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 357 (2005) (“However, there is no requirement that a criminal statute include only words that are subject to ‘mathematical certainty.’”).

203. See Fallon, *supra* note 83, at 41 (“Viewed through skeptical lenses, the Rule of Law might appear, at best, to be no more than an honorific title for an amalgam of the values, and the preferred means for promoting those values.”). Fallon rejects the skeptical lenses, but the uncertainty surrounding this widely-used concern is undeniable.

204. See, e.g., Savransky, *supra* note 16. In response to now-former-Acting Attorney General Sally Yates’s refusal to enforce President Trump’s executive order barring entry for people from seven predominantly Muslim nations, the former-Attorney General Loretta Lynch stated, “With her decision not to defend the executive order regarding immigration, Sally Yates displayed the fierce intellect, unshakeable integrity, and *deep commitment to the rule of law* that have characterized her 27 years of distinguished service to the DOJ under both Democratic and Republican administrations.” *Id.* (emphasis added).

205. See Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract*, 81 ST. JOHN’S L. REV. 99, 105 (2007).

and only if the king deemed it appropriate, that would establish a limiting principle, but it does not describe what people refer to when they speak of the rule of law.

Jennifer Arlen proposes a normative hook via an instrumental conception of the rule of law captured as a series of limits on the authority of various governmental actors to exercise discretion.<sup>206</sup> She posits that the primary mechanism for limiting discretion and promoting the rule of law entails maintaining a separation between “three separate exercises of authority: authority to create duties, authority to interpret existing duties, and authority to enforce duties and sanction their violation.”<sup>207</sup> By ensuring that “no individual actor or office enjoys all three forms of authority,” legal systems limit discretion and promote the rule of law.<sup>208</sup> Lawyers and civics students alike can easily recognize this pattern. Separation of powers: the legislature makes the laws, the judiciary interprets the laws, and the executive enforces the laws.<sup>209</sup>

Law enforcement in the corporate context has deviated too far from this model. True, the legislature makes the laws. But by enacting laws that are expansive in scope and imprecise in limit, the legislature puts too small a limit on the scope of enforcement discretion. Indeed, there may be no better example than securities fraud by which to undermine the oft-repeated claim<sup>210</sup> that federal criminal law is statutory.<sup>211</sup> Much substantive criminal law has been written by courts.<sup>212</sup>

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206. Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 191 (2016).

207. *Id.* at 193.

208. *Id.*

209. The link between the rule of law and separation of powers is not new. See GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 150–61 (1992). Wood contends that “[w]hen Americans in 1776 spoke of keeping the several parts of the government separate and distinct, they were primarily thinking of insulating the judiciary and particularly the legislature from executive manipulation.” *Id.* at 157. This point is particularly interesting in the context of white collar prosecutions, and arguably all prosecutions, where the executive has continued to expand its authority over almost all aspects of the criminal process.

210. See Kahan, *supra* note 192, at 471 (“[T]he proposition that federal crimes are ‘solely creatures of statute’ is a truth so partial that it is nearly a lie.”) (footnote omitted).

211. See Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider*

This is not to suggest enforcement discretion is unbounded; it is not. As Russell Covey points out, “true unguided discretion is extremely rare, if not altogether absent, in law.”<sup>213</sup> Indeed, one might respond that this is necessarily true, as “true unguided discretion” represents the absence of law.<sup>214</sup> This, however, misses Covey’s point. Covey is not making a claim about the nature of law; he is describing the situation that in modern, functioning legal systems—even those that might deviate from the rule of law in certain ways—actual unbounded discretion rarely occurs.<sup>215</sup> This is almost certainly true of the legal system in the United States.

For example, prosecutorial discretion is often referenced as one of the least restricted forms of discretion in the criminal justice system, and for good reason. Courts have consistently refused to exercise meaningful review over the prosecutor’s discretionary decisions.<sup>216</sup> But prosecutorial discretion is not *unbound*. A prosecutor’s decision about whether to charge remains limited by a host of factors, including the evidence available to present to a grand jury, the potential ire of the judge in front of whom she must repeatedly appear, the supervision of her superiors, and her officer’s answer to the political process. Complaints about prosecutorial discretion tend not to be that the discretion is unlimited, but rather that the limits are insufficient.<sup>217</sup>

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*Trading Prohibition*, 52 WASH. & LEE L. REV. 1189, 1201 (1995) (“The federal insider trading prohibition thus is best classified within the genus of federal common law.”); Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 545 (2011) (“The law of securities fraud is one of the most heavily judicially created bodies of federal law.”).

212. Daniel Richman, *Overcriminalization for Lack of Better Options*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* 64, 68 (Michael Klarman, David Skeel & Carol Steiker eds., 2012).

213. See Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CAL. L. REV. 449, 450 n.13 (2016).

214. *Id.*

215. *Id.*

216. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

217. See, e.g., Ronald F. Wright, *How Prosecutorial Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 581–82 (2009) (describing the failure of the political process as a meaningful limit); David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, YALE L.J. ONLINE 203, 210 (2011) (describing the failure of codes of

Poorly-drafted, uncertain, and potentially-overbroad laws represent the legislature's failure to limit the discretion of the executive enforcement function. The claim in the corporate criminal context is not about absolute discretion; it is about excessive discretion. Given the poor state of substantive laws, the legislative limit on the executive falters. Arlen's instrumental theory of the rule of law points to one solution: review and interpretation by courts.<sup>218</sup> Some laws do too little to define the forbidden and thus do little to limit discretion, and in those cases courts will strike the law as void for vagueness.<sup>219</sup> The complaint against most corporate criminal laws is not that they set no standard at all, but rather that they require "a person to conform his conduct to an imprecise but comprehensible normative standard."<sup>220</sup> Courts can and do mitigate this type of imprecision through their interpretive function.<sup>221</sup>

### 3. *Another Rule of Law Problem: Notice*

Punishment absent notice is not law; it is the mere exercise of power.<sup>222</sup> Fundamental to the rule of law is the principle that those subject to the command of law must be given notice as to both the forbidden or required conduct and the penalty for non-compliance.<sup>223</sup> In practice, this principle is as obvious as it is difficult to manage.

The rule of lenity offers respite against failures of notice, which are frequent in the white-collar context.<sup>224</sup> In practice, however, the rule of lenity has not served this function, because courts too

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conduct as a meaningful limit).

218. See generally Arlen, *supra* note 206.

219. See, e.g., *Morales*, 527 U.S. at 60 ("This ordinance is therefore vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'") (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).

220. *Coates*, 402 U.S. at 614.

221. *Id.*

222. See Robinson, *supra* note 202, at 336 ("In its original Latin dress, the legality principle was expressed as '*nullum crimen sine lege, nulla poena sine lege*,' meaning roughly 'no crime without law, nor punishment without law.'").

223. *Id.* ("[C]riminal liability and punishment can be based only upon a prior legislative enactment of a prohibition that is expressed with adequate precision and clarity.").

224. *Id.* at 346-47.

frequently decline to apply the rule.<sup>225</sup> Perhaps judicial disfavor develops because the rule would accomplish too much. Justice Breyer, after identifying cases invoking the rule of lenity, noted that “[t]he problem of statutory interpretation in these cases is indeed no different from that in many of the criminal cases that confront us.”<sup>226</sup> Perhaps the lack of clarity in criminal laws is the norm, not the exception. And if that’s the case, a vibrant rule of lenity may well devolve into a simplistic and unworkable mechanism that “automatically permits a defendant to win.”<sup>227</sup>

In the corporate context, lack of clarity is the norm, and common law refinement fails to address the notice problem. To satisfy due process, “a penal statute [must] define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement.”<sup>228</sup> The judicial process is an imperfect fix in an imperfect world; courts introduce clarity to vague statutes over time, but the cost is significant where people are punished for conduct that was not plainly forbidden.

#### 4. *The Common Law “Solution”*

The solution to overbroad and unclear criminal laws, such as it is, has been for courts to offer clarity incrementally. Common law crimes are generally considered anathema to basic principles of legality.<sup>229</sup> However, as Dan Kahan describes, a “system of federal common law crimes” not only exists; it does so “(in part) because it works so much better than the imaginary regime of legislative crimes ever would.”<sup>230</sup> As described above, federal criminal laws are more

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225. *See* *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (describing a rule of lenity of extremely limited scope, applying only in the rare case where the statute is so unclear as to leave the courts with “no more than a guess as to what Congress intended”) (internal quotation marks omitted).

226. *See id.* at 139.

227. *Id.*

228. *See* *Skilling v. United States*, 561 U.S. 358, 402–03 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)) (internal quotation marks omitted).

229. *See* Kahan, *supra* note 192, at 469.

230. *Id.* at 470.

often than not open-ended, vague, and unclear. This is particularly true in the corporate context. Often, this is true by design.<sup>231</sup> This is a problem, and courts are a solution.

Or rather, a partial solution. The incremental refinements imparted by judicial review of real cases and controversies capture the nuances of life as no cloistered code ever could.<sup>232</sup> As a mechanism for developing good rules, it is difficult to imagine a better approach. However, Kahan's pragmatism about definitional capacity offers little comfort to those "languishing in prison [where no] lawmaker has clearly said they should."<sup>233</sup> Criminal law remains our best tool for designating certain conduct beyond the pale in terms of acceptable corporate behavior.<sup>234</sup> But much of the conduct designated as criminal is by no means beyond the pale—this conduct is too broad, too ill-defined, and too widely-practiced.<sup>235</sup> Post hoc decisions designating the behavior criminal do nothing to address this problem. A common law approach to criminal law overcomes limited legislative imagination, but it falters on the notice problem.

### 5. *The Cost of Imposing Criminal Liability Without Notice*

The imposition of criminal punishment ought to be different in kind than the imposition of civil liability. Even assuming identical penalties—e.g., deprivation of property—there remains a difference between conviction of a crime and a finding of liability. Criminal law condemns,<sup>236</sup> and the condemnation rings hollow where it is based on

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231. Sam Buell tackles this problem head-on regarding fraud, writing that "[f]raud is somewhat like negligence in that it is designed to be an all-encompassing concept of wrong that a common-law system of adjudication can deploy as needed and define as it goes along, addressing cases ex post." Buell, *supra* note 211, at 520–21.

232. John Hasnas, *Reflections on Prince, Public Welfare Offenses, American Cyanamid, and the Wisdom of the Common Law*, J. CRIM. LAW AND PHIL. (forthcoming 2017) (manuscript at 2) (on file with Georgia State University Law Review).

233. See *United States v. Bass*, 404 U.S. 336, 348 (1971) (internal quotation marks omitted).

234. See Uhlmann, *supra* note 27, at 1263.

235. For more on the challenging relationship between criminal law, regulation, and institutional politics, see Richman, *supra* note 1, at 265 and Richman, *supra* note 212, at 65.

236. See FEINBERG, *supra* note 191, at 92, 98 (1970) (identifying the "symbolic significance" and the "expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation" as distinctive aspects of punishment); see also Hart, *supra* note 29, at 404 ("What

a post hoc definition of a rule grounded only in positive law. The laws are broad; they are unclear; and sometimes they are actually indeterminate before the fact. Imposing criminal liability under these conditions threatens to dilute—if not eliminate—the sole distinctive component of the criminal law, moral condemnation, because we cannot sensibly blame people for behaving in a manner that is neither morally problematic on its own terms nor plainly forbidden by law.<sup>237</sup>

When those who could not have known they were violating the law are punished, it is sometimes rationalized by reference to assumption of risk. As a British Lord famously put it: “Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot they fall in.”<sup>238</sup> But, as this colorful quote illustrates, assumption of risk fails to capture the expressive component of criminal punishment; perhaps the person who skated too close to thin ice cannot complain about getting wet, but we might not condemn him. This is particularly true in the corporate setting, where entire industries exist to help people and corporations profitably operate near poorly-defined legal limits.<sup>239</sup> Forget the lone daredevil; consider instead a cautious village that thrives when it sends fishermen near the edge of the ice.

### *III. A Better Approach: Civil Accountability*

Redoubling efforts to prosecute individuals in the corporate context will fail. The accountability gap will persist, and the result will be something more like show trials against mostly lower-level

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distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.”).

237. See Lynch, *supra* note 190, at 47 (“Both in justice to those so labeled, and to preserve the always-threatened moral capital of the criminal law from dilution, conviction of crime must ordinarily be reserved for those who violate deeply held and broadly agreed social norms.”).

238. See *Kneller Ltd. v. Dir. of Pub. Prosecution* (1972) 56 Cr. App. R. 633 (HL) 652 (appeal taken from UK); see also *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952) (“[I]t is not unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.”).

239. See Lynch, *supra* note 190, at 45.

employees who are present at the locus of the problematic decisions. Complaints about the state of corporate law enforcement do not stem from a failure to prosecute engineers, sales reps, or middle managers. Yet these are the prosecutions we should expect law enforcement to generate by redoubling our law enforcement efforts to charge individuals; strong cases with good evidence cluster further down the corporate hierarchy.<sup>240</sup>

The problem with corporate law enforcement, writ large, is one of accountability. Corporations exert influence throughout our economy, our environment, and our society. The specific decisions that have positive and negative effects are often made well down the organizational chart, simply because that is the nature of decision-making in large organizations.<sup>241</sup> But those decisions are not made in a vacuum. They are made in the context of an organizational culture that pushes behavior in a particular direction. Culture is complex, both as a matter of composition and effect.<sup>242</sup> Exactly what creates the culture is not susceptible to careful analysis, and there is little precision to inquiries about how culture influenced a particular decision. It is now uncontroversial to maintain that BP, prior to the Deepwater Horizon disaster, maintained a culture that favored risk over safety.<sup>243</sup> But this observation leaves two questions: who is responsible for that culture, and how did that culture influence the decisions on and around the rig in the hours and days leading to the disaster? Neither question is well-suited for the blunt machinery of criminal justice, which favors the binary choice between guilt and innocence.

Outside the sphere of criminal law, however, the questions are easier. Senior executives and directors establish, maintain, and promote an organizational culture.<sup>244</sup> Perhaps no single speech will

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240. See Henning, *supra* note 155, at 53.

241. *Id.*

242. See Bucy, *supra* note 23, at 1123–27 (summarizing the literature examining distinctions in corporate cultures).

243. See Uhlmann, *supra* note 27, at 1277 (citing NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *supra* note 132, at 122–26).

244. See Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn*



capture the culture, but culture flows inevitably from the behavior, decisions, and incentives established by leadership. The 2016 scandal at Wells Fargo stands as a stark reminder of how a corporate culture can be influenced by overly aggressive sales quotas and incentives, and how such a culture can manifest in illegal conduct by lower-level employees.<sup>245</sup> Yet many corporate cultures are more nuanced. They are built on years of behavior by key corporate actors, including promotion decisions and other incentives, as well as more direct messages about the values of the corporation.<sup>246</sup> Understood this way, culture is both simple and imprecise.

People understand organizational culture, and we understand it influences behavior, but with any particular question of accountability the inquiry tends to falter. When GM failed over the course of a decade to recall cars with faulty ignition switches,<sup>247</sup> we now know this failure had to do with GM's culture, but not in a way that fits with the evidentiary standard necessary to impose criminal liability.

This creates the accountability gap. The public blames senior management for corporate wrongdoing.<sup>248</sup> The blame is not irrational anger. It is grounded in the recognition that the most directly culpable and lower-level employees did not get lax about controls or violate the law in a vacuum; they did so in an environment that encouraged them to take these risks. But this imprecise blame does not comport with basic principles of legality for imposing criminal liability. We are left, accordingly, with criminal liability for the entity and

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from *Hewlett-Packard's Pretexting Scandal?*, 77 U. CIN. L. REV. 523, 542 (2008). While "tone at the top" is the core of organizational culture, as Baer notes, all organizational actors play a role in defining that culture. *Id.* ("The creation of the organization's ethical culture is generated both by the company's directors and officers—who set the 'tone at the top'—by its lawyers and accountants, and by the multitude of mid-level managers who interact with rank-and-file employees.") (footnotes omitted).

245. Emily Glazer, *How Wells Fargo's High-Pressure Sales Culture Spiraled out of Control*, WALL ST. J. (Sept. 16, 2016, 3:10 PM), <https://www.wsj.com/articles/how-wells-fargos-high-pressure-sales-culture-spiraled-out-of-control-1474053044>.

246. See Baer, *supra* note 244, at 541.

247. David M. Uhlmann, *Justice Falls Short in G.M. Case*, N.Y. TIMES (Sept. 19, 2015), <https://www.nytimes.com/2015/09/20/opinion/sunday/justice-falls-short-in-gm-case.html?mcubz=0>.

248. See Uhlmann, *supra* note 27, at 1265.

sometimes for some low-level employees, and little or no accountability among senior management who contributed to and profited from the culture that bred the misconduct.

*A. The Blame Being Assigned Is for Recklessness*

Peter Henning explored the accountability gap, and in doing so, he isolated heightened *mens rea* requirements as the most significant reason so few senior executives are prosecuted in these cases.<sup>249</sup> “[O]ne potential response . . . may be to reduce the requisite intent element, so that it is easier to pursue a case and establish a violation when there are substantial losses from corporate decisions.”<sup>250</sup> To be clear, Henning is not advocating a recklessness standard; he is exploring the costs and benefits of such a standard, simply because it is the simplest fix if we conclude that the failure to prosecute senior management for corporate misconduct requires remedying.<sup>251</sup>

The call for a recklessness standard is important because it perfectly captures the source of public condemnation. As described above, the public blames those whose recklessness causes harm; but, it is worth recognizing that the public also likely celebrates those whose recklessness generates profits or success.<sup>252</sup> The problem in the corporate context is that management must make decisions about fantastically complex markets with radically imperfect information.<sup>253</sup> Gauging the correct risk threshold in these circumstances is impossible.<sup>254</sup> Indeed, this is precisely the reason we allow discretion when setting appropriate risk tolerances for business

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249. Henning, *supra* note 155, at 46. Most criminal laws applicable to corporate misconduct require “specific intent to commit the crime, a seemingly insurmountable standard of proof for cases related to the financial crisis.” *Id.* (footnotes omitted).

250. *Id.* at 47.

251. *Id.* at 88–89.

252. See Wulf A. Kaal & Richard W. Painter, *Initial Reflections on an Evolving Standard: Constraints on Risk Taking by Directors and Officers in Germany and the United States*, 40 SETON HALL L. REV. 1433, 1440 (2010).

253. *Id.* at 1440–41.

254. *Id.* at 1438 (“[T]he concepts of ‘market failure’ and ‘excessive risk’ are both controversial. Whether markets fail and why they fail is one issue, and whether there is any such thing as excessive risk, and if so, how excessive risk is to be defined, is another issue.”).

decisions by applying the highly protective business judgment rule to post hoc criticism of management.<sup>255</sup>

Imposing criminal liability for recklessness would undoubtedly change the calculus to favor loss avoidance over risk, but this is not necessarily a good thing. As Henning concluded:

[L]oss avoidance runs counter to the usual approach to corporate decision-making; a certain measure of risk *must* be undertaken to develop a business and generate reasonable returns. The only approach virtually guaranteed to involve no appreciable risk of loss is doing nothing, but that also means there will be little if any return on investment.<sup>256</sup>

We blame excessive risk-taking where it fails. But this is a different kind of blame than that reserved for knowing or intentional wrongdoing. In these cases, the perpetrator was, almost invariably, trying to function within the law. She was hoping to manage the business in such a way as to maximize the return on investment, and risks necessarily accompany this effort. Recklessness requires both the “subjective element involving the defendant’s awareness of the risk stemming from a particular decision, and the objective requirement that the conduct be ‘far below’ what a reasonable person in a similar position would have done.”<sup>257</sup> In many business

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255. See Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 839 (1981) (“The [business judgment] rule operates to bar courts from providing additional, and unnecessary, constraints on management discretion through judicial review of operating decisions.”).

256. Henning, *supra* note 155, at 63.

257. *Id.* at 78–79. Here, Henning is describing the recklessness standard established by the British Banking Reform Act, which criminalizes recklessness in managing a financial institution. See Banking Reform Act (2013) §§ 36(1)(b)–(d) (U.K.). But the standard is familiar as it mirrors the ALI Model Penal Code:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves

decisions, those making the decision are often aware of the risks; the subjective element is plainly met. So, the only point of inquiry would be whether the risks were unjustifiable; that is, whether the risk was of “such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”<sup>258</sup> Too often, assessed in the pallid gloom of failure, risks will be difficult to justify and easy to condemn.

None of this suggests we cannot blame the reckless who fail, but perhaps we do not *condemn* them. Condemnation, after all, has long been the distinctive function of criminal law.<sup>259</sup> In free markets, post hoc assessments and bad luck separate those who thrive and profit from those who fail.<sup>260</sup> Criminalizing reckless or negligent management threatens to allow these same factors to distinguish those who thrive and profit from those who are imprisoned and condemned. Too often the conduct will be the same, and only circumstantial consequences will differ. That should not be the distinction between success and criminality.

### *B. Corporate Recklessness Is Better Addressed Through Civil Liability*

Aside from the *mens rea* challenge, too many wrongs in the corporate context are poorly defined *ex ante*. This definitional challenge results not only from poor legislating, but also from the complexity of the economy and the multitude of ways clever actors seek an edge.<sup>261</sup> As a means of identifying the scope of forbidden

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a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

MODEL PENAL CODE § 2.02(c).

258. See MODEL PENAL CODE § 2.02(c).

259. See Hart, *supra* note 29, at 405.

260. Henning, *supra* note 155, at 63.

261. Buell, *supra* note 211, at 520 (“This need for flexibility in the definition of fraud arises because fraud involves a category of human wrongdoing that is characterized by inventiveness and that is often situated within realms of economics, technology, and industry that are sites of rapid social and economic

conduct, the common law is plainly superior to legislation. John Hasnas captured this when he wrote, “[W]hen I step back from my role as advocate and engage in detached philosophical reflection, I am impressed by the subtle sophistication of the common law process . . . and find it conceptually superior to the output of the last century of criminal legislation.”<sup>262</sup> The superiority of common law as a mechanism for delineating between legal and illegal conduct is plain: it is easier to assess conduct in a particular case than to define the forbidden without context. Life is always more complicated and nuanced than imagined on the floor of the legislature, and courts engage directly with these complexities and nuances when reviewing particular cases and controversies.<sup>263</sup>

The shortcoming of common law remains that it is inconsistent with the legality principle. Criminal law is different: it imposes moral condemnation and punishment on plainly forbidden conduct; rules of utility and regulation are, or should be, civil.<sup>264</sup> To recognize that there is a set of problematic conduct that cannot be defined *ex ante*, but must be punished *ex post*, does not end the inquiry. Our legal system has multiple means of imposing punishment, and criminal liability is not only the most severe, it is also the type of law subject to the legality principle that is, at very least, in tension with what has effectively become common law crime.

Civil liability does not face the same challenges. Prosecutors ought to look to civil law in seeking to hold senior personnel accountable.<sup>265</sup> This is not to suggest criminal liability should be off

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development.”).

262. Hasnas, *supra* note 232 (manuscript at 1).

263. See *United States v. Bass*, 404 U.S. 336, 348 (1971).

264. See Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 97 (1996) (“Criminal law is preoccupied by discourse about rights, fault, consent, and separate private and public spheres. Much of the rest of the law, in contrast, is frankly utilitarian, regulatory, and collective.”). Seidman advises caution, noting that it would be a “mistake to exaggerate the exceptionalism of the criminal law.” *Id.* at 140. I do not disagree with this caution, and I find Seidman’s identification of areas of blurring at the margins compelling. But, as an ideal, criminal law is exceptional, and it is worth keeping that perspective when contemplating how to improve a particular failure of criminal law, like the accountability gap generated by corporate prosecutions.

265. See, e.g., Gilchrist, *supra* note 69, at 45 (identifying particular civil regulations that might be

the table; where a properly defined crime has been violated, and where the prosecutor can produce evidence of that violation beyond a reasonable doubt, she should bring criminal charges. The problem remains that in many instances of corporate malfeasance, the substantive law is insufficiently clear or the evidence as to *mens rea* at higher levels of the organization is lacking. In these cases, the public will blame senior management, and the public will be angered by the absence of accountability. The current trend to push for enhanced individual prosecutions is bound to fail; but, the imposition of civil liability might accomplish what the criminal law cannot.

#### CONCLUSION

Criminal law is distinctive. Perhaps less so than it once was—by way of overuse—but there is a line between criminal and civil wrongs. The former contains a moral component—or should contain a moral component—not necessary to the latter. To the extent this is less true than it could be, we have lost something and gained nothing.

The continued practice of failing to hold senior management accountable for high-profile corporate malfeasance is problematic. It sends a dangerous message of tolerance or even affirmance for their conduct, and it feeds the narrative that criminal justice applies differently to the elite. Yet the call for more individual prosecutions is misguided. Whether through the Yates Memo or otherwise, any concerted effort to increase the frequency of criminal prosecutions in the corporate context will be borne largely by relatively low-level personnel. In this way, these initiatives will do nothing to address the expressive harm they are designed to counter. Worse, too many of these prosecutions will be in tension with the rule of law and basic principles of legality. Prosecutors have strong incentives to prosecute these cases where they can; if they are not prosecuting these cases, it is generally because the cases are weak or non-existent.

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applied against individuals in the banking context).

One solution would be to change the substantive criminal law to capture more conduct with lower *mens rea* requirements. This would broaden the criminal law well beyond its traditional contours. Expanding criminal liability to people who lack *mens rea* dilutes its moral core and achieves nothing that could not more readily, and less problematically, be achieved through civil accountability.

Much of what angers the public about corporate malfeasance is the accountability gap. People blame management that takes on too much risk, when the risk is borne almost entirely by the public or by shareholders.<sup>266</sup> Risky drilling operations might improve profits, helping share price as well as the longevity and pay of senior management. They might also harm the environment, possibly in a catastrophic way. The problem is that the latter costs are borne disproportionately by the environment, the public, and shareholders; very little of this cost is borne by senior management. Management is playing with house money, and the accountability gap exacerbates that fact.

Public blame of management in many of these cases essentially means blaming them for behavior that created an unjustifiable risk. If the risk was foreseen and ignored, management appears reckless. If the risk was unforeseen, but should have been foreseen, management appears negligent. Both recklessness and negligence are blameworthy, but they are not blameworthy in the way we condemn those who intentionally violate a known legal prohibition. This lesser type of blame should be accounted for, but civil—not criminal—sanctions represent the best fit.

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266. *Id.* at 24.